

FALL, 1959
Volume 4, Number 3

Race Relations Law Reporter

**A Complete, Impartial
Presentation of Basic
Materials, Including:**

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

VANDERBILT UNIVERSITY SCHOOL OF LAW

VANDERBILT UNIVERSITY

SCHOOL OF LAW

HARVIE BRANSCOMB, Ph.D., Litt.D., LL.D., D.H.L., *Chancellor*
CHARLES MADISON SARRATT, M.A., LL.D., D.C.L., *Vice-Chancellor Emeritus*
ROB ROY PURDY, Ph.D., *Vice-Chancellor*
JOHN H. STAMBAUGH, LL.D., *Vice-Chancellor*
JOHN W. WADE, B.A., LL.B., LL.M., S.J.D., *Dean of the School of Law*
KATHLEEN B. LEONARDT, B.A., *Registrar and Administrative Assistant to the Dean*

WILLIAM R. ANDERSEN, B.S., LL.B., LL.M., *Assistant Professor of Law*
MILLARD S. BRECKENRIDGE, Ph.B., LL.B., *Visiting Professor of Law*
PAUL J. HARTMAN, B.A., LL.B., LL.M., Jur. Sc. D., *Professor of Law*
ROBERT E. KENDRICK, B.S., M.A., LL.B., LL.M., *Visiting Associate Professor of Law*

EDMUND M. MORGAN, B.A., M.A., LL.B., *Frank C. Rand Professor of Law*
LEO J. RASKIND, B.A., M.A., Ph.D., LL.B., *Associate Professor of Law*
THOMAS G. ROADY, JR., B.A., M.A., J.D., *Professor of Law*
KENNETH L. ROBERTS, B.A., LL.B., *Assistant Professor of Law*
PAUL HAMPTON SANDERS, A.B., LL.B., *Professor of Law*
WARREN A. SEAVEY, B.A., LL.B., LL.D., *Visiting Professor of Law*
THEODORE A. SMEDLEY, B.A., J.D., *Professor of Law*
HERMAN L. TRAUTMAN, B.A., LL.B., *Professor of Law*
JOHN W. WADE, B.A., LL.B., LL.M., S.J.D., *Professor of Law*
JOHN HOWARD MOORE, B.A., J.D., *Professor of Law Emeritus*

W. RAYMOND DENNEY, LL.B., *Lecturer in Law*
WILLIAM WALLER, B.S., LL.B., *Lecturer in Law*
EDWIN F. HUNT, B.A., LL.B., *Lecturer in Law*
JAMES C. KIRBY, JR., B.A., LL.B., LL.M., *Lecturer in Law*
CECIL SIMS, LL.B., *Lecturer in Law*
ROBERT W. STURDIVANT, LL.B., *Lecturer in Law*
WILLIAM WALLER, B.E., LL.B., *Lecturer in Law*
CHARLES H. WARFIELD, B.A., LL.B., *Lecturer in Law*

EUGENE G. WYATT, JR., B.A., LL.B., *Associate Director, Race Relations Law Reporter*

MARY ELIZABETH POLK GREEN, B.A., LL.B., *Law Librarian*
ANNA INGRAM, *Administrative Assistant, Race Relations Law Reporter*
BETTY CARROLL JONES, *Executive Secretary to the Law Review*
GEORGE ALVIS WINSTEAD, B.S., M.A., M.A.L.S., M.Ed., *Assistant Librarian*
PAULINE F. WOODARD, *Associate Librarian*

Bulletin or other information will be supplied on request. Write Vanderbilt University, School of Law, Nashville 5, Tennessee.

RECENT DEVELOPMENTS

. . . A Summary

Education

The *Arkansas* Supreme Court upheld statutes providing procedures for school closings by the Governor (p. 553) and for diverting funds withheld from closed schools to other schools (p. 550); but the same statutes were invalidated by a federal district court (p. 543).

A federal court refused to restore to *Delaware's* approved grade-by-year-school desegregation plan a provision that "whenever possible, every pupil in the grade affected . . . shall have the choice of (a) attending the nearest school within the district where he resides or (b) attending the school he would have attended prior to . . . this order," because it would have discriminatory effects (p. 574).

Atlanta, *Georgia*, school officials were enjoined by a federal court from operating segregated schools and were ordered to submit a desegregation plan by December 1, 1959. (p. 576).

The Fifth Circuit Court of Appeals affirmed a decision making permanent an injunction requiring desegregation of Orleans Parish, *Louisiana*, schools, and the local school board was ordered to present a plan by May 16, 1960 (p. 581). It also affirmed a decision enjoining *Louisiana* State University officials from denying Negroes admission to the University in New Orleans (p. 612).

Dismissal of *Missouri* Negro teachers' complaint alleging discrimination in rehiring by a local school board, after integration was effected, was affirmed by the Eighth Circuit Court of Appeals (p. 613).

The Sixth Circuit Court of Appeals affirmed decisions approving the Nashville, *Tennessee*, grade-by-year desegregation plan permitting voluntary transfers to schools attended largely or entirely by members of one's own race and rejecting a plan for [in addition to integrated schools] separate schools for Negro and white children whose parents voluntarily elect to patronize them (p. 584). A conviction of John Kasper for inciting to riot at the time the Nash-

ville plan was first put into effect was affirmed by the *Tennessee* Supreme Court (p. 620).

An order enjoining Norfolk, *Virginia*, officials from enforcing ordinances and resolutions providing for closing schools or grades by cutting off funds and eliminating grades affected by desegregation or through any other such "evasive scheme" designed to perpetuate the state's invalid program of massive resistance was upheld by the Fourth Circuit Court of Appeals (p. 603). While approving the criteria for assignment used by the Arlington County, *Virginia*, school board in passing on applications by 22 Negro students for transfers to white schools, a federal district court held that the criteria of overcrowding and achievement level had been discriminatorily applied to twelve applicants, who were ordered admitted to specific white schools; but a motion for a submission of a desegregation plan was denied (p. 609). The Prince Edward County, *Virginia*, Board of Supervisors resolved not to levy any taxes for the year 1959-60 for public schools or educational purposes (p. 786).

Employment

In a suit by Negro trainmen against the United States in the Court of Claims for additional wages allegedly denied them for racial reasons while working for a railroad operated by trustees appointed by and under the control of a federal district court during a bankruptcy reorganization, recovery was denied because complaint should have been made to the supervising court and because that court did not enforce a discriminatory practice (p. 644).

The Fifth Circuit Court of Appeals affirmed a holding that allegations that a *Georgia* railroad had added "swing men" to take runs from individual firemen solely to the benefit of white, and the detriment of Negro, firemen had not been proved so as to make the company in contempt of an injunction against discrimination (p. 646).

The *New York* State Commission Against Dis-

crimination dismissed a complaint charging an oil company with violating the state Law Against Discrimination by refusing to hire Jewish applicants, on the ground that a "bona fide occupational qualification" previously granted the company because of an agreement with Saudi Arabia that employees would be selected for work there in accordance with Saudi-Arabian laws forbidding Jews within the country should be continued; but this determination was annulled by a state court as being based on a private contract contrary to state law and policy protected by the Tenth Amendment (p. 630).

Housing

A judgment for the city of Gadsden, Alabama, and its housing authority in an action by Negroes seeking injunctive relief against allegedly discriminatory urban redevelopment plans, or prior purchase rights for former residents of the area involved, was affirmed by the Fifth Circuit Court of Appeals (p. 647).

The Florida Supreme Court held that covenants restricting the sale and occupancy of residential subdivision property to members of a corporation, the by-laws of which prohibited the sale or lease of such property to anyone not a Caucasian or a Gentile, were not enforceable (p. 716).

A New Jersey court held that FHA operations in connection with real estate development brought cases alleging refusal to sell houses for racial reasons within the authority of the state Division Against Discrimination concerning "publicly assisted housing" (p. 658). The Division held that it continued to have jurisdiction in a case involving discriminatory acts against a Negro attempting to rent an apartment, although an FHA-insured mortgage was paid off in the interval before a Division hearing (p. 807).

The New York Supreme Court denied a landlord's petition to quash subpoenas requiring production of housing accommodation records at a New York City Commission on Intergroup Relations hearing, holding that self-incrimination and speedy trial questions were prematurely raised therein (p. 657).

A Washington State Board Against Discrimination order requiring the sale of an FHA-financed house to Negro complainants was set aside by a state court, which held that the statutory prohibition against racial discrimination in the sale

of "publicly assisted" housing was unreasonable and violative of the state constitution's privileges and immunities clause and that the FHA aspect did not make a private refusal to sell state action (p. 664).

Organizations

The United States Supreme Court reversed an Alabama Supreme Court decision affirming again, except as to membership lists, a lower court contempt judgment against the NAACP for refusing to obey an order to produce "certain books, papers and documents" described therein (p. 535).

An Arkansas statute prohibiting the employment of a person as a public school teacher or administrator in the absence of an affidavit listing his organizational affiliations was upheld; but another, making NAACP membership a ground for dismissal or declaration of ineligibility for public employment was declared unconstitutional by a federal district court (p. 694). A recently enacted Arkansas statute permits county judges to require organizations to file information (p. 775).

The New York Supreme Court refused to approve a certificate of incorporation for a group promoting "individual freedom of choice and . . . association," upon concluding the aims sought by the group are contrary to public policy (p. 690).

A district court judgment enjoining Virginia legal officers from proceeding against the NAACP and its Legal Defense Fund under statutes punishing barratry and requiring registration and information filing by organizations engaged in racial litigation, because the statutes so applied would be unconstitutional, was vacated and remanded by the United States Supreme Court, which held that the district court should have abstained from deciding the merits and retained jurisdiction while allowing state courts a reasonable opportunity to construe the statutes (p. 527).

Public Accommodations

Recently adopted Arkansas legislation makes it unlawful for one to refuse to leave business premises upon request of the owner or manager or to encourage such conduct (p. 777).

In Maine, the legislature enacted anti-discrimination legislation applying to public accommodation places (p. 779).

A trial court decision dismissing Negroes'

complaint charging a denial of meals in defendant's cafe in violation of a statute forbidding "innkeepers" to refuse "to receive and entertain guests" was affirmed by the *Utah* Supreme Court because of insufficient evidence of refusal to serve and sufficient basis for conclusion below that innkeeper-guest relationship was not proved (p. 709).

The Fourth Circuit Court of Appeals affirmed the dismissal of a Negro's action against a restaurant in *Virginia* for refusing to serve him, noting that the invoked sections of the 1875 Civil Rights Act had long ago been invalidated and holding that the defendant was not engaged in interstate commerce (p. 713).

The *Washington* Supreme Court affirmed a decision that a reducing salon had violated the Public Accommodations Law in refusing to serve a Negress, but ordered a reduction in damages awarded for mental and emotional distress (p. 701).

Trial Procedure

The *Florida* Supreme Court rejected a contention that statutes prescribing the death penalty in rape convictions unless there is a jury recommendation of mercy produce a denial of equal protection as applied by state juries which had since 1925 prescribed the death penalty for many Negroes but for only one white person (p. 744).

Convictions of Negroes by a *Maryland* state court and a federal district court in *Massachusetts* were respectively reversed by the Maryland Court of Appeals (p. 741) and the First Circuit Court of Appeals (p. 739) for refusal of the trial judges to ask prospective jurors if they would be prejudiced because of defendants' race.

The highest appellate courts of *Alabama* (p. 730), *Arkansas*, (p. 735), *Louisiana* (p. 740) and *New York* (p. 744) upheld trial court de-

cisions that Negro defendants in criminal prosecutions had failed to prove that Negroes had been systematically excluded from juries so as to deprive them of Fourteenth Amendment rights.

Voting

Dismissal of an action brought by the United States under the 1957 Civil Rights Act against the state of *Alabama*, a county registrars board, and individuals as members of the board, to have adjudged unconstitutional alleged acts depriving persons of voting rights was affirmed by the Fifth Circuit Court of Appeals on the grounds that the Act does not authorize an action against a state, that the board is a non-able entity, and that the individuals had in good faith resigned office (p. 624). The latter court also affirmed the dismissal of a suit charging a *Louisiana* parish voter registrar with segregating races in her office on the finding that the arrangements complained of, made in good faith, had ceased prior to suit (p. 628).

The United States Supreme Court affirmed a *North Carolina* Supreme Court decision upholding statutory literacy requirements for voting (p. 523).

Miscellaneous

The United States Civil Rights Commission reported findings and recommendations in the fields of voting, education, and housing (p. 786).

Dismissal of an action challenging a Birmingham, *Alabama*, ordinance requiring segregated seating as moot because the ordinance was repealed before trial and another passed apparently delegating regulation to the bus company, and denial of leave to file a supplemental complaint was affirmed by the Fifth Circuit Court of Appeals (p. 719).

BOARD OF EDITORS:

Director	Theodore A. Smedley
Research Director	Paul H. Sanders
Associate Directors	Robert E. Kendrick
	Eugene G. Wyatt, Jr.
Adviser	John W. Wade
Chief Editorial Assistant ..	George W. Schreiner
Editorial Assistants	Adam G. Adams
	Frederick W. Hearn
	Bobby H. Shoulders

The *Race Relations Law Reporter* is published four times a year, spring, summer, fall and winter, by the Vanderbilt University School of Law at Nashville 5, Tennessee. Second-class postage paid at Nashville, Tennessee. Subscription price \$3.00 per year. If purchased separately, \$1.00 per regular issue. Mailing address: P.O. Box 6156 Acklen Station, Nashville, Tennessee.

ORIGINAL MATERIAL COPYRIGHT 1959 BY VANDERBILT UNIVERSITY SCHOOL OF LAW
(Permission to reprint copyright material will be liberally conferred. Application for permission to reprint should be addressed to the Director, *Race Relations Law Reporter*.)

TABLE OF CONTENTS

UNITED STATES SUPREME COURT

Elections

REGISTRATION

North Carolina: Lassiter v. Northampton County Bd of Elections, (USSC), p. 523.

Litigation

REGULATION

Virginia: Harrison v. NAACP et al, (USSC), p. 527.

Organizations

NAACP

Alabama: NAACP v. Alabama ex rel. Patterson and NAACP v. Livingston et al., (USSC), p. 535

Miscellaneous Orders, p. 538

COURTS

Education

PUBLIC SCHOOLS

Arkansas: Aaron et al. v. McKinley et al., (USDC, ED Ark), p. 543

Fitzhugh et al. v. Ford et al., (Sup Ct of Ark), p. 550

Garrett v. Faubus (Sup Ct. of Ark), p. 553

Delaware: Evans et al. v. Buchanan et al., (USDC, D.Del), p. 574

Georgia: Calhoun et al. v. Members of Bd of Ed, City of Atlanta et al., (USDC, ND Ga), p. 576

Louisiana: Orleans Parish School Bd v. Bush et al., (USCA, 5th Cir., and USDC, ED La), p. 581

Tennessee: Kelley et al. v. Bd of Ed of City of Nashville, Tenn., et al., (USCA, 6th Cir), p. 584

Virginia: (Norfolk): Duckworth v. James, (USCA, 4th Cir), p. 603 (Arlington): Thompson et al v. County School Bd of Arlington County et al, (USDC, ED Va), p. 609

COLLEGES AND UNIVERSITIES

Louisiana: Bd of Supervisors of LSU et al. v. Fleming et al., (USCA, 5th Cir), p. 612

TEACHERS

Missouri: Brooks et al. v. School District of City of Moberly, Missouri et al., (USCA, 8th Cir), p. 613

Civil Rights Statutes

STATE ACTION

Michigan: Watson v. Devlin et al., (USCA, 6th Cir.), p. 618

Criminal Law

CONSPIRACY, MAYHEM

Alabama: McCullough v. State, (Ct of Appeals of Ala), p. 619

CONSPIRACY, MURDER

Illinois: People v. Rybka et al., (Sup Ct of Ill), p. 620

INCITING TO RIOT

Tennessee: Kasper v. State, (Sup Ct of Tenn), p. 620

Elections

REGISTRATION

Civil Rights Act: U.S. v. State of Alabama, (USCA, 5th Cir), p. 624

Louisiana: Sharp v. Lucky, (USCA, 5th Cir), p. 628

Employment

FAIR EMPLOYMENT LAWS

New York: In the Matter of American Jewish Congress against Carter and Arabian American Oil Co., (Sup Ct of N.Y., N. Y. County, Sp Term, Pt 1), p. 630

Minnesota: Carter v. McCarthy's Cafe, (Hennepin County, Minn. Dist Ct), p. 641

LABOR RELATIONS

United States: Allen et al. v. United States (U.S. Ct of Claims), p. 644

Federal Statutes: Braly v. Trans World Airlines, (USDC, D. Del), p. 646

LABOR UNIONS

Federal Statutes: Marshall et al. v. Central of Georgia Ry Co. et al., (USCA, 5th Cir) p. 646

Governmental Facilities

METROPOLITAN REDEVELOPMENT

Alabama: Barnes v. City of Gadsden, Alabama et al., (USCA, 5th Cir), p. 647

Housing

PRIVATE HOUSING

New York: Matter of the Application of Martin, (Sup Ct of N.Y., N.Y. County, Sp Term, Pt 1), p. 657

PUBLICLY ASSISTED HOUSING

New Jersey: Levitt and Sons, Inc. v. Division Against Discrimination; Green Fields Farm, Inc. v. Division Against Discrimination, (Superior Ct of N.J., App. Div), p. 658

Washington: In the Matter of O'Meara v. Washington St Bd Against Discrimination (Superior Ct, King County), p. 664

Indians

CRIMINAL LAW

Montana: U.S. v. Red Wolf, (USDC, D. Mont), p. 688

Jurisdiction**ECCLESIASTICAL COURT**

New York: Beth Tomche Torah v. Howard, (Munic Ct, City of N.Y., Borough of Manhattan, 2nd Dist), p. 689

Organizations**MEMBERSHIP CORPORATIONS**

New York: Application of Association for Preservation of freedom of Choice, (Sup Ct of N.Y., Queens County, Spec Term, Part II), p. 690

NAACP

Arkansas: Shelton et al. v. McKinley et al., (USDC, ED Ark), p. 694

Public Accommodations**BEAUTY SALONS**

Washington: Browning v. Slenderella Systems of Seattle, (Sup Ct of Washington), p. 701

INNKEEPERS

Utah: Armwood v. Francis, (Sup Ct. of Utah), p. 709

PRIVATE CLUBS

New York: Lake Placid Club v. Abrams, (Ct of Appeals of N.Y.), p. 712

RESTAURANTS

Virginia: Williams v. Howard Johnson's Restaurant, (USDC, ED Va., USCA, 4th Cir), p. 713

Real Property**RESTRICTIVE COVENANTS**

Florida: Harris v. Sunset Islands Property Owners, Inc. (Sup. Ct of Fla), p. 718

Transportation**PASSENGER SEATING**

Alabama: Cherry et al. v. Morgan et al., (USCA, 5th Cir), p. 719

Trial Procedure**COMPLAINT DISMISSALS**

California: People v. Winters, (App. Dept. Superior Ct, Los Angeles County), p. 720

EVIDENCE

Louisiana: Labat v. Sigler, (USCA, 5th Cir), p. 727

ORAL ARGUMENT

Alabama: Flowers v. State, (Sup Ct of Ala), p. 728

JURIES

Alabama: Washington v. State (Sup Ct of Ala), p. 730

Arkansas: Williams v. State, (Sup Ct of Ark), p. 735

Federal Courts: Frasier v. United States, (USCA, 1st Cir), p. 739

JURIES, VENUE

Louisiana: State v. Scott, (Sup Ct of La), p. 740

PETIT JURIES

Maryland: Brown v. State, (Ct of Appeals of Md.), p. 741

New York: People v. Frye, (Ct of Appeals of N.Y.), p. 744

SENTENCING

Florida: Williams v. State, (Sup Ct of Fla), p. 744

LEGISLATURES**Education****PUBLIC SCHOOLS**

Arkansas: Act 208, definition of "average daily attendance," p. 747

Act 461, criteria for assignment and placement of pupils, p. 747

Florida: Chapter 59-138, power of school boards to "separate the sexes in the various schools of the county," p. 750

Chapter 59-428, additional factors in pupil assignment (amendment to Pupil Assignment Law), p. 751

PUBLIC SCHOOL FUNDS

Arkansas: Act 275, transfer of school funds, p. 752

Arkansas: Act 486, return of surplus funds, p. 753

COMPULSORY ATTENDANCE

Florida: Chapter 59-412, exemption of married students from compulsory attendance statute, p. 753

PRIVATE SCHOOLS

Florida: Chapter 59-471, creation and enumeration of powers of Board of Private Education, p. 755

Chapter 59-113, procedure for organization of private school corporations and enumeration of powers, p. 762

SCHOOL OFFICIALS

Arkansas: Act 207, continuation of official duties of incarcerated school district directors, p. 765

TEACHER RETIREMENT

Arkansas: Act 55, membership of private school teachers in retirement system, p. 766

TUITION GRANTS

Arkansas: Act 46, financial aid to persons prohibited from attending public schools for reasons beyond their control, p. 766

Act 236, tuition grants for pupils attending segregated or private schools, p. 767

Blood Banks**LABELING**

Arkansas: Act 482, labeling of human blood according to race of donor, p. 768

Criminal Law**BOMBING**

Florida: Chapter 59-29, prohibition of use of explosives to harm person or property, p. 769

BOMBING THREATS

Arkansas: Act 300, prohibition of false communication of bomb damage threats, p. 770

UNIFORM POST-CONVICTION ACT

Arkansas: Act 227, repeal of Uniform Post-Conviction Act, p. 771

Employment**FAIR EMPLOYMENT LAWS**

Missouri: St. Louis Bd of Aldermen resolution re discrimination in employment of persons on public works, p. 771

Governmental Facilities**BEACHES AND PARKS**

Florida: Chapter 59-377, closing and reopening of public recreation facilities, by sheriff, p. 772

DISPOSAL

Arkansas: Act 224, disposition of certain public recreational facilities, p. 773

Housing**CONTIGUOUSLY-LOCATED HOUSING**

Connecticut: Public Act 113, coverage of Public Accommodations Act, p. 774

Organizations**REGISTRATION, FILING OF INFORMATION**

Arkansas: Act 225, power of county judge to require organizations to file certain information, p. 775

Public Accommodations**BUSES**

Arkansas: Act 81, numbering of seats and penalties for refusal to accept assignment, p. 776

OWNER'S CONTROL OF PREMISES

Arkansas: Act 14, penalty for refusal to leave business premises when requested, p. 777

STATUTORY ENFORCEMENT

Connecticut: Public Act 111, initiation by Civil Rights Commission of complaints for violation of Public Accommodations Statute, p. 778

GENERAL

Maine: Public Law Chapter 282, definition of places of public accommodation; prohibitions against discrimination therein, p. 779

Public Disturbances**PRIVATE PROPERTY**

Arkansas: Act 226, prohibition against breaches of peace in public place of business, p. 780

ADMINISTRATIVE AGENCIES**Education****PUBLIC SCHOOLS**

Arkansas: Little Rock School Board Statement; Governor Faubus' letter to School Board re school plans, p. 781

North Carolina: Craven County Board of Education resolution re children of Negro military personnel, p. 785

Virginia: (Prince Edward County) Bd of Supervisors resolution re levying of taxes for 1959-1960, p. 786

Civil Rights**COMMISSION REPORT: FEDERAL**

Findings and recommendations of Commission re voting, education, and housing, p. 786

Education, Housing**STUDENT ORGANIZATION AND HOUSING**

California: University of California Regents' statement re discrimination in operation of student governments, p. 803

Employment**FAIR EMPLOYMENT LAWS**

New York: Miller Against Checkers and Clerks Union (N.Y. SCAD, Exec. Dept), p. 804

Housing**PUBLICLY-ASSISTED HOUSING**

New Jersey: Smith v. Fromm (N.J. Dept of Ed., Div. Against Discrimination), p. 807

STUDENT HOUSING

Washington: University of Washington Bd of Regents' statement re nondiscrimination in University housing, p. 810

ATTORNEYS GENERAL**Education****PUBLIC SCHOOLS**

Virginia: Ordinance to adopt compulsory attendance statute in Montgomery County, pp. 811

REFERENCE

Federal Review of State Factual Determinations, p. 813

Federal Judicial Power: A Study of Limitations (Part IV: Enjoining State Court Proceedings), p. 825

UNITED STATES SUPREME COURT

ELECTIONS

Registration—North Carolina

Louise LASSITER v. NORTHAMPTON COUNTY BOARD OF ELECTIONS.

United States Supreme Court, June 8, 1959, 79 S.Ct. 985.

SUMMARY: A Negro woman in Northampton County, North Carolina, brought a class action in federal district court against a registrar of voters seeking relief from the refusal of the registrar to permit registration because of the application of a literacy test required by North Carolina statute. While the action was pending in federal court, the statute was amended so as to remove a "grandfather clause" and a prior requirement that literacy be established to the "satisfaction of the registrar," and to provide for administrative and court review of the action of the registrar. (2 Race Rel. L. Rep. 706). A three-judge district court was convened, and issued an order restraining proceedings in the case pending the exhaustion of state administrative and judicial remedies. *Lassiter v. Taylor*, 152 F.Supp. 295, 2 Race Rel. L. Rep. 832 (E.D. N.C. 1957). Subsequently plaintiff again presented herself for registration, but refused to submit to the literacy test and was denied registration. Her appeal was rejected by the County Board of Elections and an appeal was taken to the Superior Court of Northampton County which overruled plaintiff's contentions that the literacy requirement violated the North Carolina Constitution as well as the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States. On appeal to the Supreme Court of North Carolina, the judgment was sustained on the basis of a 1945 amendment of the voting section of the state constitution which was interpreted as having reaffirmed the literacy requirement. The statute including the literacy requirement was deemed applicable alike to all persons presenting themselves for registration and therefore not in conflict with any provision of the Constitution of the United States. 248 N.C. 102, 102 S.E.2d 853, 3 Race Rel. L. Rep. 495 (1958). On appeal to the Supreme Court of the United States, the judgment was affirmed. Noting generally the broad powers long recognized in the states to determine the conditions under which suffrage may be exercised and specifically the judicial sanction previously accorded literacy as a test "neutral on race, creed, color, and sex," the court held that the provision applicable to all prospective voters requiring them to "read and write any section of the Constitution of North Carolina in the English language" is "one fair way" to determine literacy. The court also noted that there was nothing in the legislative setting of the statute and no great discretion vested in registrars to indicate it to be a device merely to make racial discrimination easy.

Mr. Justice DOUGLAS delivered the opinion of the Court.

This controversy started in the Federal District Court. Appellant, a Negro citizen of North Carolina, sued to have the literacy test for voters prescribed by that State declared unconstitutional and void. A three-judge court was con-

vened. That court noted that the literacy test was part of a provision of the North Carolina Constitution that also included a grandfather clause. It said that the grandfather clause plainly would be unconstitutional under *Guinn v. United*

States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340. It noted, however, that the North Carolina statute which enforced the registration requirements contained in the State Constitution had been superseded by a 1957 Act and that the 1957 Act does not contain the grandfather clause or any reference to it. But being uncertain as to the significance of the 1957 Act and deeming it wise to have all administrative remedies under that Act exhausted before the federal court acted, it stayed its action, retaining jurisdiction for a reasonable time to enable appellant to exhaust her administrative remedies and obtain from the state courts an interpretation of the statute in light of the State Constitution. *Lassiter v. Taylor*, D.C. 152 F.Supp. 295.

[*Began as Administrative Proceeding*]

Thereupon the instant case was commenced. It started as an administrative proceeding. Appellant applied for registration as a voter. Her registration was denied by the registrar because she refused to submit to a literacy test as required by the North Carolina statute.¹ She appealed to the County Board of Elections. On the *de novo* hearing before that Board appellant again refused to take a literacy test and she was again denied registration for that reason. She appealed to the Superior Court which sustained the Board against the claim that the requirement of the literacy test violated the Fourteenth, Fifteenth, and Seventeenth Amendments of the Federal Constitution. Preserving her federal question, she appealed to the North Carolina Supreme Court which affirmed the lower court. 248 N.C. 102, 102 S.E.2d 853. The case came here by appeal, 28 U.S.C. § 1257 (2), 28 U.S.C.A. § 1257 (2), and we noted probable jurisdiction. 358 U.S. 916, 79 S.Ct. 294, 3 L.Ed.2d 236.

The literacy test is a part of § 4 of Art. VI of the North Carolina Constitution. That test is contained in the first sentence of § 4. The second sentence contains a so-called grandfather clause. The entire § 4 reads as follows:

1. This Act, passed in 1957, provides in § 163-28 as follows:

"Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section."

Sections 163-28.1, 163-28.2, and 163-28.3 provide the administrative remedies pursued in this case.

"Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: *Provided*, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons, entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section 2 of this article."

Originally Art. VI contained in § 5 the following provision:

"That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other, that the whole shall stand or fall together."

But the North Carolina Supreme Court in the instant case held that a 1945 amendment to Article VI freed it of the indivisibility clause. That amendment rephrased § 1 of Art. VI to read as follows:

"Every person born in the United States, and every person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this Article, shall be entitled to vote."

That court said that "one of those qualifications" was the literacy test contained in § 4 of Art. VI; and that the 1945 amendment "had the effect of incorporating and adopting anew the provisions as to the qualifications required of a voter as set out in Article VI, freed of the indivisibility clause of the 1902 amendment. And the way was made clear for the General Assembly

to act." 248 N.C. at page 112, 102 S.E.2d at page 860.

In 1957 the Legislature rewrote General Statutes 163-28 as we have noted.² Prior to that 1957 amendment § 163-28 perpetuated the grandfather clause contained in § 4 of Art. VI of the Constitution and § 163-32 established a procedure for registration to effectuate it.³ But the 1957 amendment contained a provision that "All laws and clauses of laws in conflict with this Act are hereby repealed."⁴ The federal three-judge court ruled that this 1957 amendment eliminated the grandfather clause from the statute. 152 F.Supp. at page 296.

The Attorney General of North Carolina, in an *amicus* brief, agrees that the grandfather clause contained in Art. VI is in conflict with the Fifteenth Amendment. Appellee maintains that the North Carolina Supreme Court ruled that the invalidity of that part of Art. VI does not impair the remainder of Art. VI since the 1945 amendment to Art. VI freed it of its indivisibility clause. Under that view Art. VI would impose the same literacy test as that imposed by the 1957 statute and neither would be linked with the grandfather clause which, though present in print, is separable from the rest and void. We so read the opinion of the North Carolina Supreme Court.

2. Note 1, *supra*.

3. Section 163-32 provided:

"Every person claiming the benefit of section four of article six of the Constitution of North Carolina, as ratified at the general election on the second day of August, one thousand nine hundred, and who shall be entitled to register upon the permanent record for registration provided for under said section four, shall prior to December first, one thousand nine hundred and eight, apply for registration to the officer charged with the registration of voters as prescribed by law in each regular election to be held in the State for members of the General Assembly, and such persons shall take and subscribe before such officer an oath in the following form, viz.:

"I am a citizen of the United States and of the State of North Carolina; I am — years of age. I was, on the first day of January, A.D. one thousand eight hundred and sixty-seven, or prior to said date, entitled to vote under the constitution and laws of the state of —, in which I then resided (or, I am a lineal descendant of —, who was, on January one, one thousand eight hundred and sixty-seven, or prior to that date, entitled to vote under the constitution and laws of the state of —, wherein he then resided)."

4. N.C. Laws 1957, c. 287, p. 277.

[Permanent Registration]

Appellant argues that that is not the end of the problem presented by the grandfather clause. There is a provision in the General Statutes for permanent registration in some counties.⁵ Appellant points out that although the cut-off date in the grandfather clause was December 1, 1908, those who registered before then might still be voting. If they were allowed to vote without taking a literacy test and if appellant were denied the right to vote unless she passed it, members of the white race would receive preferential privileges of the ballot contrary to the command of the Fifteenth Amendment. That would be analogous to the problem posed in the classic case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, where an ordinance unimpeachable on its face was applied in such a way as to violate the guarantee of equal protection contained in the Fourteenth Amendment. But this issue of discrimination in the actual operation of the ballot laws of North Carolina has not been framed in the issues presented for the state court litigation. Cf. *Williams v. State of Mississippi*, 170 U.S. 213, 225, 18 S.Ct. 583, 588, 42 L.Ed. 1012. So we do not reach it. But we mention it in passing so that it may be clear that nothing we say or do here will prejudice appellant in tendering that issue in the federal proceedings which await the termination of this state court litigation.

We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color. The Court in *Guinn v. United States*, *supra*, 238 U.S. 366, 35 S.Ct. 931, disposed of the question in a few words, "No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen its establishment was but the exercise by the state of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted."

⁵ Section 163-31.2 provides:

"In counties having one or more municipalities with a population in excess of 10,000 and in which a modern loose-leaf and visible registration system has been established as permitted by G.S. 163-43, with a full time registration as authorized by G.S. 163-31, such registration shall be a permanent public record of registration and qualification to vote, and the same shall not thereafter be cancelled and a new registration ordered, either by precinct or countywide, unless such registration has been lost or destroyed by theft, fire or other hazard."

[State Has Broad Powers]

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams*, 193 U.S. 621, 633, 24 S.Ct. 573, 576, 48 L.Ed. 817; *Mason v. State of Missouri*, 179 U.S. 328, 335, 21 S.Ct. 125, 128, 45 L.Ed. 214, absent of course the discrimination which the Constitution condemns. Article I, § 2 of the Constitution in its provision for the election of members of the House of Representatives and the Seventeenth Amendment in its provision for the election of Senators provide that officials will be chosen "by the people." Each provision goes on to state that "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures." So while the right of suffrage is established and guaranteed by the Constitution (Ex parte *Yarborough*, 110 U.S. 651, 663-665, 4 S.Ct. 152, 158, 159, 28 L.Ed. 274; *Smith v. Allwright*, 321 U.S. 649, 661-662, 64 S.Ct. 757, 763-764, 88 L.Ed. 987) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed. See *United States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368. While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of "the right to vote," the right protected "refers to the right to vote as established by the laws and constitution of the state." *McPherson v. Blacker*, 146 U.S. 1, 39, 13 S.Ct. 3, 12, 36 L.Ed. 869.

[Not All Standards Acceptable]

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis v. Beason*, 133 U.S. 333, 345-347, 10 S.Ct. 299, 301-302, 33 L.Ed. 637) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports

around the world show.⁶ Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. Cf. *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221, appeal dismissed 339 U.S. 946, 70 S.Ct. 804, 94 L.Ed. 1361. It was said last century in Massachusetts that a literacy test was designed to insure an "independent and intelligent" exercise of the right of suffrage.⁷ *Stone v. Smith*, 159 Mass. 413-414, 34 N.E. 521. North Carolina agrees. We do not sit in judgment on

6. World Illiteracy at Mid-Century, Unesco (1957).

7. Nineteen States, including North Carolina, have some sort of literacy requirement as a prerequisite to eligibility for voting. Five require that the voter be able to read a section of the State or Federal Constitution and write his own name. *Arizona Rev. Stat. § 16-101*; *West's Ann.Cal.Election Code § 220*; *Del.Code Ann., Tit. 15, § 1701*; *Me.Rev.Stat., c. 3, § 2*; *Mass.Gen.L. Ann., c. 51, § 1*. Five require that the elector be able to read and write a section of the Federal or State Constitution. *Ala.Code, Tit. 17, § 32*; *N.H.Rev.Stat. Ann. §§ 55:10 to 55:12*; *N.C.Gen.Stat. § 163-28*; *Okla.Stat. Ann., Tit. 26, § 61*; *S.C.Code § 23-62*. Alabama also requires that the voter be of "good character" and "embrace the duties and obligations of citizenship" under the Federal and State Constitutions. *Ala.Code, Tit. 17, § 32*.

Two States require that the voter be able to read and write English. *N.Y.Election Law § 150*; *Ore. Rev.Stat. § 247.131*. *Wyoming (Wyo.Comp.Stat. Ann. § 31-113)* and *Connecticut (Conn.Gen. Stat. § 9-12)* require that the voter read a constitutional provision in English, while *Virginia (Va. Code § 24-68)* requires that the voting application be written in the applicant's hand before the registrar and without aid, suggestion or memoranda. *Washington (Wash.Rev.Code § 29.07.070)* has the requirement that the voter be able to read and speak the English language.

Georgia requires that the voter read intelligibly and write legibly a section of the State or Federal Constitution. If he is physically unable to do so, he may qualify if he can give a reasonable interpretation of a section read to him. An alternative means of qualifying is provided: if one has good character and understands the duties and obligations of citizenship under a republican government, and he can answer correctly 20 of 30 questions listed in the statute (e. g., How does the Constitution of Georgia provide that a county site may be changed?, what is treason against the State of Georgia?, who are the solicitor general and the judge of the State Judicial Circuit in which you live?) he is eligible to vote. *Geo.Code Ann. §§ 34-117, 34-120*.

In Louisiana one qualifies if he can read and write English or his mother tongue, is of good character, and understands the duties and obligations of citizenship under a republican form of government. If he cannot read and write, he can qualify if he can give a reasonable interpretation of a section of the State or Federal Constitution when read to him, and he is attached to the principles of the

the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. In *Davis v. Schnell*, D.C., 81 F.Supp. 872, 873, affirmed 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093, the test was the

Federal and State Constitutions. LSA-R.S., Tit. 18, § 31.

In Mississippi the applicant must be able to read and write a section of the State Constitution and give a reasonable interpretation of it. He must also demonstrate to the registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government. Miss.Code Ann. § 3213.

citizen's ability to "understand and explain" an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter "be able to read and write any section of the Constitution of North Carolina in the English language." That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.

Affirmed.

LITIGATION Regulation—Virginia

Albertis S. HARRISON, Jr., Attorney General of Virginia, et al. v. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation, and NAACP Legal Defense and Educational Fund, Incorporated.

United States Supreme Court, June 8, 1959, 79 S.Ct. 1025.

SUMMARY: The NAACP and the NAACP Legal Defense and Educational Fund, Inc., in companion suits filed in federal district court sought to enjoin the Attorney General of Virginia and certain local prosecuting attorneys from enforcing the 1956 Virginia legislation [2 Race Rel. L. Rep. 1015-1026] requiring registration and reports by organizations engaged in racial litigation and forbidding certain activities promoting or supporting litigation. A majority of the three-judge court concluded that application to the normal activities of the NAACP of the Acts which punish barratry and require registration and filing of information would be unconstitutional. It therefore granted an injunction "restraining the defendant from proceeding against the plaintiffs under Chapters 31, 32 and 35 because of the activities of the plaintiffs in the past on behalf of the colored people in Virginia as disclosed in the evidence in this case or because of the continuance of like activities in the future." The statutes relating to "running and capping" (Chapter 33) and maintenance of litigation (Chapter 36) were characterized by the court as "vague and ambiguous," and it refrained from passing upon their constitutionality but stated that the complaint would be retained for a reasonable time, pending the determination of proceedings in the state courts brought by the plaintiffs to secure an interpretation of the statutes. 159 F.Supp. 503, 3 Race Rel. L. Rep. 274 (E.D. Va. 1958). Defendants appealed the disposition of Chapters 31, 32 and 35 to the United States Supreme Court, which held (6-3) that the district court should have, as in the case of Chapters 33 and 36, abstained from deciding the merits of the issues before it so as to give state courts a reasonable opportunity to construe the three statutes in question, the terms of which, the court

stated, left "reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." Noting that assurances had been given by defendants that they would not proceed against plaintiffs under any of the questioned statutes with respect to activities engaged in during the full pendency of this litigation, the court vacated the judgment below and remanded the case to the district court with instructions to afford plaintiffs a reasonable opportunity to bring appropriate proceedings in state courts while retaining its own jurisdiction.

Mr. Justice HARLAN delivered the opinion of the Court.

In this case a three-judge District Court was convened pursuant to 28 U.S.C. § 2281, 28 U.S.C.A. § 2281, to hear federal constitutional challenges against five Virginia statutes. It declared three invalid under the Fourteenth Amendment, and permanently enjoined the appellants from enforcing them against the appellees; the other two statutes it found vague and ambiguous and accordingly retained jurisdiction pending a construction by the state courts. 159 F.Supp. 503. Only the former disposition was appealed. The appeal raises two questions: First, whether in the circumstances of this case the District Court should have abstained from a constitutional adjudication, retaining the cause while the parties, through appropriate proceedings, afforded the Virginia courts an opportunity to construe the three statutes in light of state and federal constitutional requirements. Second, if such an abstention was not called for, whether the District Court's constitutional holdings were correct. Because of our views upon the first question we do not reach the second.

National Association for the Advancement of Colored People (NAACP) and NAACP Legal Defense and Educational Fund, Incorporated (Fund), appellees herein, are organizations engaged in furthering the rights of colored citizens. Both are membership corporations organized under the laws of New York, and have registered under the laws of Virginia as foreign corporations doing business within the State. NAACP's principal relevant activities in Virginia are appearing before legislative bodies and commissions in support of, or opposition to, measures affecting the status of the Negro race within the State, and furnishing assistance to Negroes concerned in litigation involving their constitutional rights. Fund performs functions similar to those of NAACP in the field of litigation, but is precluded by its charter from attempting to influence legislation. The revenues of NAACP are

derived both from membership dues and general contributions, those of Fund entirely from contributions.

[Civil Rights Acts Invoked]

NAACP and Fund brought this action against the Attorney General of Virginia and a number of other Commonwealth officials, appellants herein, for declaratory and injunctive relief with respect to Chapters 31, 32, 33, 35 and 36 of the Acts of the Virginia Assembly, passed in 1956. 4 Va.Code, 1958 Supp., §§ 18-349.9 to 18-349.37; 7 Va.Code, 1958, §§ 54-74, 54-78, 54-79. The complaint, alleging irreparable injury on account of these enactments, sought a declaration that each infringed rights assured under the Fourteenth Amendment and an injunction against its enforcement. Jurisdiction was predicated upon the civil rights statutes, 42 U.S.C. §§ 1981, 1983, 42 U.S.C.A. §§ 1981, 1983, 28 U.S.C. § 1343, 28 U.S.C.A. § 1343, diversity of citizenship, 28 U.S.C. § 1332, 28 U.S.C.A. § 1332, and the presence of a federal question, 28 U.S.C. § 1331, 28 U.S.C.A. § 1331.

The Attorney General and his codefendants moved to dismiss the action on the ground, among others, that the District Court should not "exercise its jurisdiction to enjoin the enforcement of state statutes which have not been authoritatively construed by the state courts." The District Court, recognizing "the necessity of maintaining the delicate balance between state and federal courts under the concept of separate sovereigns," stated that "the constitutionality of state statutes requiring special competence in the interpretation of local law should not be determined by federal courts in advance of a reasonable opportunity afforded the parties to seek an adjudication by the state court," but considered that relief should be granted where "the statute is free from ambiguity and there remains no reasonable interpretation which will render it constitutional * * *." 159 F.Supp. at

pages 522, 523. On this basis, the court, one judge dissenting, held Chapters 31, 32, and 35 unconstitutional, and permanently enjoined their enforcement against NAACP and Fund. Chapters 33 and 36, on the other hand, the court unanimously found vague and ambiguous. It accordingly retained jurisdiction as to those Chapters, without reaching their constitutionality, allowing the complaining parties a reasonable time within which to obtain a state interpretation.

[Probable Jurisdiction Noted]

The Commonwealth defendants, proceeding under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253, appealed to this Court the lower court's disposition of Chapters 31, 32, and 35. We noted probable jurisdiction. 358 U.S. 807, 79 S.Ct. 33, 3 L.Ed.2d 53. NAACP and Fund did not appeal the disposition of Chapters 33 and 36.

The three Virginia statutes before us are lengthy, detailed, and sweeping. Chapters 31 and 32 are registration statutes. Chapter 31 deals with the rendering of financial assistance in litigation. It proscribes the public solicitation of funds, and the expenditure of funds from whatever source derived, for the commencement or further prosecution of an "original proceeding," by any person, broadly defined to include corporations and other entities, which is neither a party nor possessed of a "pecuniary right or liability" in such proceeding, unless a detailed annual filing is made with the State Corporation Commission. If such person is a corporation, the filing must include among other things, (1) certified copies of its charter and by-laws; (2) "a certified list of the names and addresses of the officers, directors, stockholders, members, agents and employees or other persons acting for or in [its] behalf;" (3) a certified statement of the sources of its income, however derived, including the names and addresses of contributors or donors if required by the Commission; (4) a detailed certified statement of the corporation's expenditures for the preceding year, the objects thereof, and whatever other information relative thereto may be required by the Commission; and (5) a certified statement of the "counties and cities in which it proposes to or does finance or maintain litigation to which it is not a party." Correspondingly broad disclosures are required of individuals who fall within the statutory proscription.

[Punishable as Misdemeanor]

Violation of this Chapter is punishable as a misdemeanor for individuals, and by a fine of not more than \$10,000 for corporations, plus a mandatory denial or revocation of authority to do business within the State in the case of a foreign corporation. An individual "acting as an agent or employee" of a corporation or other entity with respect to activity violative of the Chapter is deemed guilty of a misdemeanor. And directors, officers, and "those persons responsible for the management or control of the affairs" of a corporation or other entity are made jointly and severally liable for whatever fines might be imposed on it.

Chapter 32 deals with activities relating to the passage of racial legislation, with advocacy of "racial integration or segregation," and also with the raising and expenditure of funds in connection with racial litigation. Declaring that the "continued harmonious relations between the races are . . . essential to the welfare, health and safety of the people of Virginia," the Chapter finds it "vital to the public interest" that registration be made with the State Corporation Commission by "persons, firms, partnerships, corporations and associations whose activities are causing or may cause interracial tension and unrest." Specifically, under § 2 of this Chapter, annual filings are required of

"[e]very person, firm, partnership, corporation or association, whether by or through its agents, servants, employees, officers, or voluntary workers or associates, who or which engages as one of its principal functions or activities in the promoting or opposing in any manner the passage of legislation by the General Assembly in behalf of any race or color, or who or which has as one of its principal functions or activities the advocating of racial integration or segregation or whose activities cause or tend to cause racial conflicts or violence, or who or which is engaged or engages in raising or expending funds for the employment of counsel or payment of costs in connection with litigation in behalf of any race or color, in this State . . ."

[Extent of Filing Comparable]

The extent of such filing is comparable to that required by Chapter 31. The information so

furnished is a matter of public record, to "be open to the inspection of any citizen at any time during the regular business hours of" the State Corporation Commission.

Failure to register subjects individuals to punishment as for a misdemeanor, and corporations to a fine not exceeding \$10,000. Like Chapter 31, Chapter 32 also makes "responsible" persons liable jointly and severally for corporate fines. Further, "[e]ach day's failure to register and file the information required * * shall constitute a separate offense and be punished as such." The Chapter is not applicable to persons or organizations which carry on the proscribed activities through matter which may qualify as second-class mail in the United States mails, or by radio or television, nor to persons or organizations acting in connection with any political campaign.

Chapter 35 is a "barratry" statute. Barratry is defined as "the offense of stirring up litigation." A "barrator" is thus a person or organization which "stirs up litigation." Stirring up litigation means "instigating," which in turn "means bringing it about that all or part of the expenses of the litigation are paid by the barrator," or by those, other than the plaintiffs, acting in concert with him, "unless the instigation is justified." An instigation is "justified" when "the instigator is related by blood or marriage to the plaintiff whom he instigates, or * * * is entitled by law to share with the plaintiff in money or property that is the subject of the litigation or * * * has a direct interest ["personal right or pecuniary right or liability"] in the subject matter of the litigation or occupies a position of trust in relation to the plaintiff; or * * * is acting on behalf of a duly constituted legal aid society approved by the Virginia State Bar which offers advice or assistance in all kinds of legal matters to all members of the public who come to it for advice or assistance and are unable because of poverty to pay legal fees."

[Guilty Lose Licenses]

Individuals guilty of barratry as defined in the Chapter are punishable as for a misdemeanor and "shall" have their licenses "to practice law or any other profession * * * revoked for such period as provided by law." Corporations are subject to a fine of not more than \$10,000 and, if they are foreign, mandatory revocation of their authority to do business within the State. Moreover, a "person who aids and abets a barrator

by giving money or rendering services to or for the use or benefit of the barrator for committing barratry shall be guilty of barratry and punished * * *." A host of exceptions to which the Chapter is not applicable is provided;¹ none of these has thus far been asserted to include, or be capable of including appellees.

The majority below held Chapters 31 and 32² unconstitutional on similar grounds, centering its treatment of both around § 2 of Chapter 32, the material provisions of which have already been set forth, 79 S.Ct. at page 1028, supra. In essence § 2 was found to infringe rights assured under the Fourteenth Amendment, in that, taken in conjunction with the registration requirements of the statute, (1) the clause relating to the promoting or opposing of racial legislation invaded rights of free speech because it was not restricted to lobbying activities;³ (2) the clause directed at advocacy of racial "integration or segregation" had the same infirmity because it was not supported by a compelling state interest or some clear and present danger;⁴ (3) the clause referring to activities causing or tending to cause racial conflicts or violence was too

1. "This article shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not protect the client from payment of the costs and expense of litigation, nor shall this article apply to any matter involving annexation, zoning, bond issues, or the holding or results of any election or referendum, nor shall this article apply to suits pertaining to or affecting possession of or title to real or personal property, regardless of ownership, nor shall this article apply to suits involving the legality of assessment or collection of taxes or the rates thereof, nor shall this article apply to suits involving rates or charges or services by common carriers or public utilities, nor shall this article apply to criminal prosecutions nor to the payment of attorneys by legal aid societies approved by the Virginia State Bar, nor to proceedings to abate nuisances. Nothing herein shall be construed to be in derogation of the constitutional rights of real parties in interest to employ counsel or to prosecute any available legal remedy under the laws of this State."
2. Chief Judge Hutcheson, the dissenting judge, did not reach the constitutionality of any of these statutes, because of his views on the "abstention" issue.
3. In this, the District Court relied on *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989.
4. The lower court cited, among other cases, *American Communications Ass'n v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925; *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149; *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; and *distinguished People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184.

vague and indefinite to satisfy constitutional requirements;⁵ and (4) the clause aimed at the raising and expending of funds in connection with racial litigation unduly burdened the right of access to the courts, and did not serve an interest which could support a disclosure as broad as the one demanded.⁶

[Chapter 35 Invalidated]

Chapter 35, the "barratry" statute, was held to offend due process, in that it was found to be aimed not at the legitimate regulation of the practice of law but at preventing NAACP and Fund from continuing "their legal operations." In addition, the court held the Chapter to violate equal protection by unjustifiably discriminating between the racial litigation activities of the appellees and the general litigation efforts of "approved" legal aid societies.

These constitutional holdings were made in the context of findings that Chapters 31, 32, and 35, as well as Chapters 33 and 36 not presently before us, were passed by the Virginia Legislature "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873] * * as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." 159 F.Supp. at pages 511, 515. In the view we take of this case we do not reach appellants' objections to these findings.

According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. In other words, we think that the District Court in dealing with Chapters 31, 32, and 35 should have followed the same course that it did with respect to Chapters 33 and 36.

[Reason for Procedure]

This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly ad-

ministered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "scrupulous regard for the rightful independence of state governments * * * should at all times actuate the federal courts." *Matthews v. Rodgers*, 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447, as their "contribution * * * in furthering the harmonious relation between state and federal authority * * ." *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, e. g., *Railroad Commission of Texas v. Pullman Co.*, *supra*; *City of Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168, 62 S.Ct. 986, 86 L.Ed. 1355; *Spector Motor Service, Inc., v. McLaughlin*, 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101; *American Federation of Labor v. Watson*, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873; *Shipman v. DuPre*, 339 U.S. 321, 70 S.Ct. 640, 94 L.Ed. 877; *Albertson v. Millard*, 345 U.S. 242, 73 S.Ct. 600, 97 L.Ed. 983; *Government & Civic Employees Organizing Committee, C.I.O. v. Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed. 2d 894. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See *City of Chicago v. Fieldcrest Dairies, Inc.*, *supra*, 316 U.S. at pages 172-173, 62 S.Ct. at page 988.

The present case, in our view, is one which calls for the application of this principle, since we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.

[Construction Required]

It certainly cannot be said that Chapter 35 does not require a construction by the state courts. As appellants asserted here and in the court below, the Chapter might well be read as requiring a "stirring up" of litigation in the

5. Citing *United States v. Harriss*, *supra*.

6. On the latter ground, the court distinguished such cases as *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, and *Burroughs v. United States*, 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484; and cited *Thomas v. Collins*, *supra*.

conventional common-law sense, in addition to the "unjustified" payment of litigation expenses. Were it to be so read, the statute might then not even apply to these appellees since the lower court found the evidence "uncontradicted that the initial steps which have led to the institution and prosecution of racial suits in Virginia with the assistance of the Association and the Fund have not been taken until the prospective plaintiffs made application to one or the other of the corporations for help." 159 F.Supp. at page 533. Further the "personal right" component of "direct interest" in the statutory definition of "justified" instigation (see 79 S.Ct. at page 1028, *supra*) might lend itself to a construction which would embrace nonparty Negro contributors to litigation expense, including NAACP because of the relationship of that organization to its members. Cf. NAACP v. State of Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488.

The possibility of limiting interpretation, characteristic of constitutional adjudication, also cannot be ignored. Government & Civic Employees Organizing Committee, C.I.O. v. Windsor, *supra*. The "advocacy" clause of Chapter 32, for example, might be construed as reaching only that directed at the incitement of violence. Cf. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356. Similar construction might be employed with respect to the clause in that Chapter relating to the influencing of legislation "in any manner," cf. *United States v. Harriss*, *supra*; *United States v. Rumely*, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770. And, in connection with these and the membership and contributor list requirements of Chapters 31 and 32, cf. NAACP v. Alabama, *supra*, we note that Chapter 32 contains a separability clause, and that the Supreme Court of Appeals of Virginia treats legislative acts as separable, where possible, even in the absence of such an express provision. See *Woolfolk v. Driver*, 186 Va. 174, 41 S.E.2d 463.

[No Substantive Effect]

We do not intimate the slightest view as to what effect any such determinations might have upon the validity of these statutes. All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon

their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court. The Virginia declaratory judgment procedure, 2 Va.Code, 1950, §§ 8-578 to 8-585, which the appellees are now pursuing with reference to Chapters 33 and 36, also provides an expeditious avenue here. And of course we shall not assume that the Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements.

[Assurances by Counsel]

Because of its findings, amply supported by the evidence, that the existence and threatened enforcement of these statutes worked great and immediate irreparable injury on appellees, the District Court's abstention with respect to Chapters 33 and 36 proceeded on the assumption "that the defendants will continue to cooperate, as they have in the past, in withholding action under the authority of the statutes until a final decision is reached * * *." 159 F. Supp. at page 534. In this Court counsel for the appellants has given similar assurances with respect to the three statutes presently before us, assurances which we understand embrace also the intention of these appellants never to proceed against appellees under any of these enactments with respect to activities engaged in during the full pendency of this litigation. While there is no reason to suppose that such assurances will not be honored by these or other Virginia officials not parties to this litigation, the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees while this case goes forward.

Accordingly, the judgment below will be vacated and the case remanded to the District Court, with instructions to afford the appellees a reasonable opportunity to bring appropriate proceedings in the Virginia courts, meanwhile retaining its own jurisdiction of the case, and for further proceedings consistent with this opinion.

It is so ordered.

Judgment vacated and case remanded with instructions.

Dissent by Douglas, Warren, Brennan

Mr. Justice DOUGLAS, with whom The CHIEF JUSTICE and Mr. Justice BRENNAN concur, dissenting.

The rule invoked by the Court to require the Federal District Court to keep hands off this litigation until the state court has construed these laws is a judge-made rule. It was fashioned in 1941 in the decision of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971, as a device to avoid needless decisions under the Federal Constitution where a resolution of state law questions might make those adjudications unnecessary. Since that time, the rule of the *Pullman* case has been greatly expanded. It has indeed been extended so far as to make the presence in federal court litigation of a state law question a convenient excuse for requiring the federal court to hold its hand while a second litigation is undertaken in the state court. This is a delaying tactic that may involve years of time and that inevitably doubles the cost of litigation. When used widespread, it dilutes the stature of the Federal District Courts, making them secondary tribunals in the administration of justice under the Federal Constitution.

With all due deference, this case seems to me to be the most inappropriate one of all in which to withhold the hand of the Federal District Court. Congress has ordained in the Civil Rights Act that "all persons within the jurisdiction of the United States shall have the same right in every State . . . to sue, be parties, give evidence . . . as is enjoyed by white citizens . . ." 42 U.S.C. § 1981, 42 U.S.C.A. § 1981. It has subjected to suit "Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights . . . secured by the Constitution and laws . . ." 42 U.S.C. § 1983, 42 U.S.C.A. § 1983; and has given the District Courts "original jurisdiction" of actions "to redress the deprivation, under color of any State law . . . of any right . . . secured by the Constitution of the United States or by any Act of Congress, providing for equal rights of citizens . . ." 28 U.S.C. § 1343, 28 U.S.C.A. § 1343. The latter section was invoked here. From the time when Congress first implemented the Fourteenth

Amendment by the comprehensive Civil Rights Acts of 1871 the thought has prevailed that the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people. Representative Dawes, in the debate on the 1871 bill, asked "what is the proper method of thus securing the free and undisturbed enjoyment of these rights?" Looking to the Act which eventually became law he answered, "The first remedy proposed by this bill is a resort to the courts of the United States.¹ Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges and immunities; and hold him to account there, I submit . . . that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and fact, as that great tribunal of the Constitution." Cong. Globe, 42d Cong., 1st Sess. 476 (1871).

[Duty to Provide Remedy]

It seems plain to me that it was the District Court's duty to provide this remedy, if the appellees, who invoked that court's jurisdiction under the Civil Rights Act, proved their charge that the appellants, under the color of the Virginia statutes, had deprived them of civil rights secured by the Federal Constitution. See *Hague v. C. I. O.*, 307 U.S. 496, 530-532, 59 S.Ct. 954, 83 L.Ed. 1423.

Judge Soper, speaking for the three-judge District Court, said that the five statutes against which the suits were directed "were enacted for the express purpose of impeding the integration of the races in the public schools" of Vir-

1. It was not until 1875 that Congress gave the federal courts general jurisdiction over federal-question cases. 18 Stat. 470. The choice made in the Civil Rights Acts of 1870 and 1871 to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. Whether or not that premise is true today the fact remains that there has been no alteration of the congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth Amendments and the Civil Rights Acts.

ginia. 159 F.Supp. 503, 511. He reviewed at length the legislative history of the five Virginia statutes (Id., 511-515) concluding that "they were passed to nullify as far as possible the effect of the decision" of this Court in *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083. Id., 159 F. Supp. 511. They were indeed "parts of the general plan of massive resistance" which Virginia inaugurated against those decisions. Id., 515.

Of course Virginia courts were not parties to the formulation of that legislative program. But they are interpreters of Virginia laws and bound to construe them, if possible, so that the legislative purpose is not frustrated. Where state laws make such an assault as these do on our decisions and a State has spoken defiantly against the constitutional rights of the citizen, reasons for showing deference to local institutions vanish. The conflict is plain and apparent; and the federal courts stand as the one authoritative body for enforcing the constitutional right of the citizens.

[Other Plans Before Court]

This Court has had before it other state schemes intended to emasculate constitutional provisions or circumvent our constitutional decisions. In *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, a "Grandfather Clause" in an Oklahoma suffrage statute, exempting citizens who were qualified to vote on January 1, 1866, and their lineal descendants, from the requirements of a literacy test was said to have "no discernible reason other than the purpose to disregard the prohibitions of the [Fifteenth] Amendment," and was struck down because in "direct and positive disregard" of that Amendment. Id., 238 U.S. at pages 363, 365, 35 S.Ct. at pages 930, 931. Oklahoma sought to avoid the effects of that decision (rendered in 1915) by requiring all qualified voters in 1916 to register within a named 12-day period, else the right to vote would be lost to them permanently. Persons who voted in the 1914 election were, however, exempt from the requirement. The new statute was invalidated, this Court noting that the Fifteenth Amendment barred "sophisticated as well as simple-minded" "contrivances by a state to thwart equality in the enjoyment of the right to vote." *Lane v. Wilson*, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83

L.Ed. 1281. The Boswell Amendment to the Alabama Constitution required prospective voters to understand and explain a section of the Alabama Constitution to the satisfaction of a registrar. A three-judge court found it to be a device in purpose and in practice to perpetuate racial distinctions in regulation of suffrage. We affirmed the judgment without requiring any submission of the amendment to the state courts to see how they might narrow it. *Schnell v. Davis*, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093, affirming D.C., 81 F.Supp. 872. All these cases originated in federal courts and implicated state laws evasive of our decisions; and we decided them without rerouting them through the state courts.

["White Primary" Cases]

A similar history is evidenced by the "White Primary" cases. It starts with *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759, where a Texas statute prohibiting Negroes from participating in Democratic Party primary elections was characterized as a "direct and obvious infringement" of the Fourteenth Amendment's Equal Protection Clause. As a result of that decision, the Texas Legislature enacted a new statute authorizing the State Executive Committee of a political party to prescribe the qualifications for voters in its primary elections. Pursuant thereto the Democratic Party Committee adopted a resolution limiting the voting privilege to white democrats. Finding that the Committee was an arm of the State, and that it discharged its power in such a way as to "discriminate invidiously between white citizens and black" this Court overturned the restriction. *Nixon v. Condon*, 286 U.S. 73, 89, 52 S.Ct. 484, 487, 76 L.Ed. 984. In *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, we held that approval by the state party convention of the discriminating prohibition did not save it. And see *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152. These cases too originated in federal courts and were aimed at state laws at war with our decisions. Here, again we decided them without making the parties first repair to the state courts for a construction of the state statutes.

We need not—we should not—give deference to a state policy that seeks to undermine paramount federal law. We fail to perform the duty expressly enjoined by Congress on the

federal judiciary in the Civil Rights Acts when we do so.

To return to the present case: the error, if any, of the District Court was not in passing

on the constitutionality of three of the five Virginia statutes now before us but in remitting the parties to the Virginia courts for a construction of the other two.

ORGANIZATIONS NAACP—Alabama

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE v. ALABAMA
ex rel. John PATTERSON.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE v. Honorable J. Ed LIVINGSTON, Chief Justice of the Supreme Court of Alabama, et al.

United States Supreme Court, June 8, 1959, Nos. 753, 674 Misc., _____ U.S. _____, 79 S.Ct. 1001.

SUMMARY: The Attorney General of Alabama brought suit in an Alabama state court to restrain the National Association for the Advancement of Colored People from doing business in Alabama without complying with state laws requiring registration of foreign corporations. A temporary restraining order was issued against the Association. 1 Race Rel. L. Rep. 707 (1956). Later, the court ordered the Association to produce certain books, papers and documents, including a membership list, and on refusal to produce the latter, the Association was adjudged in contempt and fined. 1 Race Rel. L. Rep. 917 (1956). The Alabama Supreme Court denied certiorari to review the contempt order. 1 Race Rel. L. Rep. 919 and 2 Race Rel. L. Rep. 177 (1956). The United States Supreme Court granted certiorari, and subsequently found that "the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interest privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." The judgment of contempt and fine were dissolved and the case remanded. 357 U.S. 449, 3 Race Rel. L. Rep. 611 (1958). On remand, the Association moved the Supreme Court of Alabama to send the United States Supreme Court mandate to the original state trial court so that a hearing might be had on the merits of the injunction that had been issued. The motion was overruled and the judgment was again affirmed. The court, although recognizing that the Association was not in contempt for refusing to submit its membership lists, held that it was still in contempt for failure to produce the other "certain books, papers and documents" described in the lower court's order. [See also *NAACP v. Jones*, 109 So.2d 140, 4 Race Rel. L. Rep. 376 (Ala. 1959)]. This judgment was reversed by the United States Supreme Court upon a second grant of certiorari. The court held that since in the former proceedings before it the state had not denied the Association's claim to have satisfactorily complied with the production order except as to membership lists, but rather had assumed the position in brief and argument that the sole question was the Association's constitutional right to refuse to produce membership records and that a decision on that issue would dispose of the whole case, the Alabama Supreme Court was foreclosed from re-examining the grounds of the United States Supreme Court's disposition. The court noted, however, that if it should appear necessary, upon further proceedings in the trial court, the Association could further be required to produce other items such as may be appropriate, reasonable, and constitutional. The court also denied a petition for a writ of mandamus against the Alabama Supreme Court, on the assumption that it would now promptly comply with the mandate of the prior decision.

PER CURIAM.

The petition for a writ of certiorari is granted.

In our original opinion in this case, 357 U.S. 449, we held the Alabama judgement of civil contempt against this petitioner, together with the \$100,000 fine which it carried, constitutionally impermissible in the circumstances disclosed by the record. We declined, however, to review the trial court's restraining order prohibiting petitioner from engaging in further activities in the State, that order then not being properly before us. 357 U.S., at 466-467. Our mandate, issued on August 1, 1958, accordingly remanded the case to the Supreme Court of Alabama "for proceedings not inconsistent with" our opinion.

[Case on Remand]

In due course the petitioner moved in the Supreme Court of Alabama that our mandate be forwarded to the Circuit Court of Montgomery County for the further proceedings which were left open by our decision. After the motion had been twice renewed (Petitioner's motion was first made on November 5, 1958, and was renewed, on November 19, 1958, and on December 1, 1958, by mailing to the Attorney General and filing with the Alabama Supreme Court copies of the original.) the Supreme Court of Alabama on February 12, 1959, "again affirmed" the contempt adjudication and \$100,000 fine which this Court had set aside. (In its previous order, on which the former proceeding here was based, the Alabama Supreme Court held that certiorari did not lie to review the merits of the contempt adjudication, and dismissed the original petition for certiorari on that ground, 265 Ala. 349. Its presently unpublished opinion on which the present proceedings are based includes this statement: "Lest there be no misapprehension on the part of the bench and bar of Alabama, we here reaffirm the well recognized and uniform pronouncements of this Court with respect to the functions and limitations of common-law certiorari, and the distinctions between that and other methods of review. 265 Ala. 349, supra. As we stated in *American Federation of State, County and Municipal Employees v. Dawkins*, 268 Ala. ____, 104 So.2d 827: 'We cannot hurdle or make shipwreck of well known rules of procedure in order to accommodate a single case.'") Finding that the Circuit Court had determined that petitioner had failed to "produce

the documents described" in its production order, the State Supreme Court concluded that this Court was "mistaken" in considering that, except for the refusal to provide its membership lists, petitioner had complied, or tendered satisfactory compliance, with such order. This conclusion was considered as "necessitating another affirmance of the [contempt] judgment," involving, so the State Court thought, matters not covered by the opinion and mandate of this Court.

[Former Proceedings Reviewed]

We have reviewed the petition, the response of the State and all of the briefs and the record filed here in the former proceedings. Petitioner there claimed that it had satisfactorily complied with the production order, except as to its membership lists, and this the State did not deny. In fact, aside from the procedural point, both the State and petitioner in the certiorari papers posed one identical question, namely, had the petitioner "the constitutional right to refuse to produce records of its membership in Alabama, relevant to issues in a judicial proceeding to which it is a party, on the mere speculation that these members may be exposed to economic and social sanctions by private citizens of Alabama because of their membership?" (State's Brief in Opposition to Petition for Certiorari p. 2.) (Question I in the petition for certiorari was as follows: "Whether the refusal of petitioner to produce names and addresses of its Alabama members was protected by the Fourteenth Amendment's interdiction against state interference with First Amendment rights?") The State made not even an indication that other portions of the production order had not been complied with and, therefore, required its affirmance. On the contrary, the State on this phase of the case relied entirely on petitioner's refusal to furnish the "records of its membership." That was also the basis on which the issue was briefed and argued before us by both sides after certiorari had been granted. That was the view of the record which underlay this Court's conclusion that petitioner had "apparently complied satisfactorily with the production order, except for the membership lists," 357 U.S., at 465. And that was the premise on which the Court disposed of the case. The State plainly accepted this view of the issue presented by the record and by its argument on it, for it did not seek a rehearing or suggest

a clarification or correction of our opinion in that regard.

[Compliance Controverted]

It now for the first time here says that it "has never agreed, and does not now agree that the petitioner has complied with the trial court's order to produce with the exception of membership. The respondent, in fact, specifically denies that the petitioner has produced or offered to produce in all aspects except for lists of membership." This denial comes too late. The State is bound by its previously taken position, namely, that decision of the sole question regarding the membership lists, is dispositive of the whole case.

We take it from the record now before us that the Supreme Court of Alabama evidently was not acquainted with the detailed basis of the proceedings here and the consequent ground for our defined disposition. Petitioner was, as the Supreme Court of Alabama held, obliged to produce the items included in the Circuit Court's order. It having claimed here its satisfactory compliance with the order, except as to its membership lists, and the State having not denied this claim it was taken as true. (Indeed had the State denied this claim it would have raised additional serious constitutional issues. As we noted in our original opinion the contempt adjudication not only carried a fine of serious proportions, but under Alabama law it had the effect of foreclosing "petitioner from obtaining a hearing on the merits of the underlying ouster action, or from taking any steps to dissolve the temporary restraining order which had been issued ex parte, until it purged itself of contempt." 357 U.S., at 454. Yet upon the facts disclosed by the record, the validity of a contempt decree carrying these consequences would, apart from the refusal to produce the membership lists, have depended upon nothing more substantial than the reasonableness of the degree of petitioner's tendered compliance. For example, Item "5" of the production order called for: "All files, letters, copies of letters, telegrams and other correspondence, dated or occurring within the last twelve Months next preceding the date of

filing the petition for Injunction, pertaining to or between the National Association for the Advancement of Colored People, Inc., and persons, corporations, associations, groups, chapters and partnerships, within the State of Alabama." Petitioner's tender was this: "the files in the offices of respondent [petitioner] are filed under subject matter headings. Therefore, to comply with this paragraph would require respondent to search all of its files in order to secure all information requested. Respondent receives correspondence in its offices at the rate of 50,000 letters alone per year and files are maintained for a period of ten years. Respondent produces, however, all memoranda to branches during the twelve months period next preceding June 1, 1956, which would include its branches in the State of Alabama.")

[Alabama Supreme Court Foreclosed]

In these circumstances the Alabama Supreme Court is foreclosed from reexamining the grounds of our disposition. "Whatever was before the Court, and is disposed of, is considered as finally settled." *Sibald v. United States*, 12 Pet. 488, 492. See also *Martin v. Hunter's Lessee*, 1 Wheat, 304; *Tyler v. Magwire*, 17 Wall. 253.

This requires that the judgment of the Supreme Court of Alabama be reversed. Upon further proceedings in the Circuit Court, if it appears that further production is necessary, that court may, of course, require the petitioner to produce such further items, not inconsistent with this and our earlier opinion, that may be appropriate, reasonable and constitutional under the circumstances then appearing.

We assume that the State Supreme court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings, 357 U.S., at 466-467, and, therefore deny petitioner's application in No. 674, Misc., for a writ of mandamus.

It is so ordered.

Mr. Justice Stewart took no part in the consideration or decision of this case.

MISCELLANEOUS ORDERS

The United States Supreme Court

Denied petition for rehearing:

Kasper v. United States (prior decision, 79 S.Ct. 1452, 4 Race Rel. L. Rep. 252 [1959] in which the United States Supreme Court denied certiorari, leaving in effect a decision of the Court of Appeals for the Sixth Circuit affirming a district court judgment for criminal contempt of court for violating an order of the district court issued in a case [*McSwain v. County Board of Education* of Anderson County, Tennessee, 138 F.Supp. 570, 1 Race Rel. L. Rep. 317 (1956)] requiring the discontinuance of racial segregation in a Clinton, Tennessee, high school, and overruling contentions of denial of constitutional rights to freedom of speech and a fair trial). No. 966 (1958-1959 docket), October 12, 1959, 28 L.W. 3111. Other decisions: 1 Race Rel. L. Rep. 872, 1045 (1956); 2 Race Rel. L. Rep. 26, 317, 792, 795 (1957); 4 Race Rel. L. Rep. 285 (1959).

National Association for the Advancement of Colored People v. State of Alabama ex rel. Patterson (Prior decision 79 S.Ct. 1001, 4 Race Rel. L. Rep. 252, 347, 535, *supra*, [1959] in which the United States Supreme Court granted certiorari and reversed a decision of the Alabama Supreme Court affirming again, except as to membership lists, a judgment of contempt by a lower state court against the NAACP for refusing to obey a court order to produce "certain books, papers and documents" described in the order. The case had previously been remanded by the United States Supreme Court, which had held on certiorari that the NAACP could constitutionally refuse to produce its membership lists). No. 753 (1958-59 docket), October 12, 1959, 28 L.W. 3111. Other decisions: 1 Race Rel. L. Rep. 707, 917, 919 (1956); 2 Race Rel. L. Rep. 177 (1957); 3 Race Rel. L. Rep. 611 (1958); 4 Race Rel. L. Rep. 347 (1959).

Denied Certiorari (i.e., declined to review):

Allen v. United States (Prior decision 173 F.Supp. 358, 4 Race Rel. L. Rep. 644, *infra* [Ct. Cl. 1959] in which recovery was denied to Negro trainmen who sued the United States for the difference between wages received and those which they claimed they should have received but for racial discrimination while working for a railroad operated by trustees appointed by and under the control of a federal district court during reorganization under the federal Bankruptcy Act, because plaintiffs could have complained to the supervising court and because that court did not enforce a discriminatory practice within the doctrine of *Shelley v. Kraemer* [334 U.S. 1 (1948)]) No. 354, November 9, 1959, 28 L.W. 3148.

Buford v. State of Texas (Prior decision 322 S.W.2d 366 [Tex. Civ. App. 1959] affirming dismissal of an action by holders of 1861 Texas bonds against the state for payment thereon, because statute of limitation provision in 1951 act permitting suit on the bonds had run, but not reaching the question whether the Fourteenth Amendment forbids payment of the bonds or whether that Amendment was legally adopted). No. 293, October 12, 1959, 28 L.W. 3110.

County School Board of Prince Edward County, Virginia v. Allen (Prior decision 266 F.2d 507, 4 Race Rel. L. Rep. 297 [4th Cir. 1959] reversing a district court decision which fixed 1965 as the deadline for compliance by the Prince Edward County, Virginia, School Board, with desegregation orders, and directing the district court to order the Board to consider Negro children's applications for admission to the "white" high school so as to permit entrance in September, 1959, and to make plans for desegregating elementary schools "at the earliest practical day"). No. 227, October 12, 1959, 28 L.W. 3109. Other decisions: 1 Race Rel. L. Rep. 5 (1954); 1 Race Rel. L. Rep. 82 (1955); 1 Race Rel. L. Rep. 1055 (1956); 2 Race Rel. L. Rep. 341 (1957); 3 Race Rel. L. Rep. 964 (1958).

Covington v. Edwards (Prior decision 264 F.2d 780, 4 Race Rel. L. Rep. 278 [4th Cir. 1959] affirming a dismissal of a suit by Negroes to secure admission to Montgomery County, North Carolina, public schools without regard to race or color for failure to allege exhaustion of administrative remedies under state pupil assignment statutes). No. 222, October 12, 1959, 28 L.W. 3110, order: "The petition for writ of certiorari is denied. Mr. Justice Douglas is of the opinion certiorari should be granted." Other decisions: 1 Race Rel. L. Rep. 516 (1956); 3 Race Rel. L. Rep. 1144 (1958).

Duckworth v. James (Prior decision 267 F.2d 224, 4 Race Rel. L. Rep. 603, *infra*, [4th Cir. 1959] upholding a district court order enjoining Norfolk, Virginia, city officials from enforcing ordinances and resolutions or otherwise closing schools or grades by measures designed to perpetuate the state's invalid program of massive resistance to public school desegregation). No. 286, October 12, 1959, 28 L.W. 3110. Other decisions: 4 Race Rel. L. Rep. 55, 57 (1959). See also *Beckett v. School Board of the City of Norfolk, Virginia*, 148 F.Supp. 430, 2 Race L. Rep. 46, 337 (E.D. Va. 1957), *aff'd*, 246 F.2d 325, 2 Race Rel. L. Rep. 808 (4th Cir. 1957), 3 Race Rel. L. Rep. 942, 1156 (E.D. Va. 1958).

Ginsburg v. Stern (Prior decision 263 F.2d 457, 4 Race Rel. L. Rep. 309 [3rd Cir. 1959] affirming a district court denial of a motion to vacate an order dismissing a complaint charging Justices of the Pennsylvania Supreme Court with conspiring to deprive plaintiff of constitutional rights embodied in the federal Civil Rights Act through alleged improper interpretation of state law and procedure in deciding unfavorably to plaintiff certain other cases in which he had been a party, because defendants were immune to liability for official acts). No. 118, October 12, 1959, 28 L.W. 3109. Other decisions: 148 F.Supp. 663 (W.D. Pa. 1956); 3 Race Rel. L. Rep. 486 (1958); 356 U.S. 932 (1958); 356 U.S. 954 (1958); 357 U.S. 924 (1958).

Harpole v. United States ex rel. Goldsby (Prior decision 263 F.2d 71, 4 Race Rel. L. Rep. 377 [5th Cir. 1959] reversing a district court decision that a Negro convicted of murder had waived objection to systematic exclusion of Negroes from the petit jury, and holding that defendant was legally detained under indictment as he waived objection to the grand jury and therefore was not presently entitled to discharge under habeas corpus but that if he had not been retried within eight months before a jury from which Negroes have not been systematically excluded petition for habeas corpus would again be considered). No. 163 Misc., October 12, 1959, 28 L.W. 3111; No. 112, October 12, 1959, 28 L.W. 3110, order: "The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is denied." Other decisions: 78 So.2d 762 (Miss. 1955); 350 U.S. 925 (1955); 1 Race Rel. L. Rep. 565 (1956); 352 U.S. 944 (1957); 3 Race Rel. L. Rep. 66 (1957).

Holt v. Raleigh City Board of Education (Prior decision 265 F.2d 95, 4 Race Rel. L. Rep. 281 [4th Cir. 1959] affirming dismissal of a Negro boy's suit for declaration of right to attend a Raleigh, North Carolina, "white" public school and for injunctive relief, because of failure to exhaust administrative remedies through refusing to appear at a hearing provided for by statute, although invited to answer questions concerning his application for reassignment). No. 114, October 12, 1959, 28 L.W. 3109. Another decision: 3 Race Rel. L. Rep. 917 (1958).

Perry v. State of North Carolina (Prior decision 250 N.C. 119, 108 S.E.2d 447, 4 Race Rel. L. Rep. 366 [N.C. Supreme Court, 1959], holding that a Negro defendant's motion to quash the indictment under which he was convicted of a crime, because of alleged systematic exclusion of Negroes from the grand jury which returned it, was properly denied in the absence of evidence to prove racial discrimination at any time in the jury selection procedure). No. 249, October 12, 1959, 28 L.W. 3110. Another decision: 3 Race Rel. L. Rep. 755 (1958).

State of Louisiana v. Scott (Prior decision 110 So.2d 530, 4 Race Rel. L. Rep. 740, *infra* [La. Supreme Court, 1959] upholding the conviction of a Negro for an aggravated rape upon a white woman against allegations that the trial court erred in overruling motions (1) to quash the indictment and the general venire on the ground of systematic exclusion of Negroes from

the general venire, because racial discrimination had not been proved and such objections to a venire cannot be raised on a motion to quash an indictment, and (2) for a change of venue on the ground that it would be impossible in this case of great local notoriety to secure an unbiased jury, because the record failed to show an abuse of discretion by the trial judge in view of evidence that a fair trial could be held locally). No. 267, October 12, 1959, 28 L.W. 3110.

Williams v. State of Florida (Prior decision 110 So.2d 654, 4 Race Rel. L. Rep. 744, *infra* [Fla. Supreme Court, 1959] rejecting contention of Negro appealing from a conviction and death sentence for rape that statutes prescribing the death penalty, unless a majority of the jury recommends mercy, upon conviction of this crime produce an unconstitutional denial of equal protection as applied by Florida juries, which had since 1925 prescribed the death penalty in rape cases for 33 Negroes but for only one white person). No. 103 Misc., October 12, 1959, 28 L.W. 3110. See also *State ex rel. Copeland v. Mayo*, 87 So.2d 501, 1 Race Rel. L. Rep. 903 (Fla. 1956) and *Thomas v. State*, 92 So.2d 621, 2 Race Rel. L. Rep. 657 (Fla. 1957).

Other orders:

Johnson v. Tuscarora Nation of Indians (Prior decision 257 F.2d 886, 3 Race Rel. L. Rep. 1122 [2d Cir. 1958] reversing a federal district court decision dismissing, on the ground that the New York Court of Claims was the proper forum, a complaint by an Indian nation seeking an injunction and declaratory judgment against the appropriation of tribal lands by the Power Authority of the State of New York, and holding that the Authority as an agent of Congress could exercise the power of eminent domain only as Congress had prescribed—through proceedings in the federal district court or in state courts—and not under state law permitting appropriation and eviction without judicial proceeding). No. 4, October 12, 1959, 28 L.W. 3108, order: "The motion to substitute John Burch McMorran as the party appellant in the place of John W. Johnson is granted." Other decisions: 3 Race Rel. L. Rep. 715, 1021, 1132 (1958); 4 Race Rel. L. Rep. 252, 344 (1959).

Cases Docketed:

Barnes v. City of Gadsden, Alabama (Prior decision 268 F.2d 593, 4 Race Rel. L. Rep. 647, *infra* [5th Cir. 1959] affirming a judgment in favor of defendant city and its housing authority in an action by Negro citizens seeking a declaratory judgment and injunction against execution of urban redevelopment plans alleged to be racially discriminatory or, in the alternative, to obtain prior rights of purchase in favor of former residents of the area involved). No. 499, October 27, 1959, 28 L.W. 3136. Other decisions: 3 Race Rel. L. Rep. 712, 1017 (1958).

Boynton v. Commonwealth of Virginia (Prior decision Refused Case No. 4668 [Va. Supreme Court of Appeals, 1959] declining to review, but staying mandate of, a Richmond, Virginia, municipal court judgment convicting a Negro interstate bus passenger on a complaint that charged "trespass upon the premises at Trailway Bus Terminal, 9th and Broad Streets" and sentencing him to pay a \$10 fine for violation of a statute which makes it unlawful to remain "without authority of law" upon premises of another after having been forbidden to do so, in refusing to leave terminal restaurant where he had sought refreshment at a regularly scheduled stop in course of his interstate journey). No. 409, September 15, 1959, 28 L.W. 3083.

Brooks v. School District of City of Moberly, Missouri (Prior decision 267 F.2d 733, 4 Race Rel. L. Rep. 613, *infra* [8th Cir. 1959] affirming the dismissal of a suit by Negro public school teachers seeking a declaratory judgment, injunction, and damages against municipal school officials for allegedly practicing a policy of racial discrimination in re-hiring teachers after local schools were integrated in 1955, substantial evidence being noted to support the district

court's conclusion that racial discrimination had not been established and that the school board's rule for recommending teacher appointments, including the intangible elements of "personality and ability to fulfill the requirements of the position," had been fairly applied). No. 402, September 14, 1959, 28 L.W. 3080. Another decision: 3 Race Rel. L. Rep. 660 (1958).

Faubus v. Aaron (Prior decision *Aaron v. McKinley*, 173 F.Supp. 944, 4 Race Rel. L. Rep. 543, *infra* [E.D. Ark. 1959] holding an Arkansas legislative act providing procedures by which the Governor might order schools closed unconstitutional for violating the due process and equal protection clauses of the Fourteenth Amendment, and declaring another act providing for withholding of state funds from schools so closed and transferring them to other schools invalid for being complementary to and dependent upon the first act). No. 458, October 7, 1959, 28 L.W. 3112.

Kelley v. Board of Education of City of Nashville, Tennessee (Prior decision 270 F.2d 209, 4 Race Rel. L. Rep. 584, *infra* [6th Cir. 1959] affirming district court decisions approving a school board plan of grade-by-year desegregation of school system with a provision for voluntary transfer to a school attended largely or entirely by members of one's own race and rejecting a plan for [in addition to integrated schools] separate schools for Negro and white children whose parents voluntarily elect to patronize the latter schools). No. 477, October 15, 1959, 28 L.W. 3131. Other decisions: 1 Race Rel. L. Rep. 519, 1042 (1956); 2 Race Rel. L. Rep. 21, 970 (1957); 3 Race Rel. L. Rep. 180, 651 (1958).

State Board of Education v. Aaron (Prior decision, *Aaron v. McKinley*, 173 F. Supp. 944, 4 Race Rel. L. Rep. 543, *infra* [E.D. Ark. 1959] holding an Arkansas legislative act providing procedures by which the Governor might order schools closed unconstitutional for violating the due process and equal protection clauses of the Fourteenth Amendment, and declaring another act providing for withholding state funds from schools so closed and transferring them to other schools invalid for being complementary to and dependent upon the first act). No. 471, October 11, 1959, 28 L.W. 3131.

United States of America v. State of Alabama (Prior decision 267 F.2d 808, 4 Race Rel. L. Rep. 624, *infra* [5th Cir. 1959] affirming the dismissal of an action by the United States under the 1957 Civil Rights Act against the State of Alabama, a county board of voter registrars, and named individuals as members of the board to have adjudged unconstitutional activities of the defendants alleged to deprive United States citizens of rights to vote in elections in Alabama without racial discrimination and enjoin them from further such activities, because jurisdiction over states in a civil rights action had not been conferred on the district court by federal statute, the board was not a legal entity subject to suit, and the individuals, having resigned office, were not subject to preventive relief). No. 398, September 11, 1959, 28 L.W. 3080. Other decisions: 4 Race Rel. L. Rep. 97, 322 (1959).

COURTS

EDUCATION

Public Schools—Arkansas

John AARON et al. v. Ed I. McKINLEY, Jr., President, and Everett Tucker, Jr., Ben D. Rowland, Sr., Russell H. Matson, Jr., Robert W. Laster and Ted L. Lamb, Members of the Board of Directors, Little Rock School District et al.

United States District Court, Eastern District, Arkansas, Western Division, June 18, 1959, 173 F.Supp. 944.

SUMMARY: Act No. 4 of the 1958 Extraordinary Session of the Arkansas General Assembly [3 Race Rel. L. Rep. 1048 (1958)] provides for procedures by which the Governor may order closing of schools. Act No. 5 of the 1958 Extraordinary Session [3 Race Rel. L. Rep. 1043 (1958)], as amended by Act No. 151 of the 1959 General Assembly [4 Race Rel. L. Rep. 390 (1959)], provides for withholding state funds while any school is so closed and whenever any student enrolls in any school other than the one he would normally attend, and for the payment of funds so withheld to other public or non-profit private schools which students of the closed schools or students transferring from integrated schools should elect to attend. In a class action by Little Rock Negro school children before a three-judge federal district court, declaratory and injunctive relief was sought against state and local school officials and the governor upon the claim that these acts are violative of the Fourteenth Amendment. Noting that the Arkansas Supreme Court had upheld Act No. 4 [*Garrett v. Faubus*, 323 S.W.2d 877, 4 Race Rel. L. Rep. 553, *infra* (1959)] and Act No. 5 [*Fitzhugh v. Ford*, 323 S.W.2d 559, 4 Race Rel. L. Rep. 550, *infra* (1959)], the court nevertheless declared both Acts invalid. Act No. 4 was held not to constitute a reasonable exercise of the state police power to meet an emergency [the court citing *Aaron v. Cooper*, 257 F.2d 33, 3 Race Rel. L. Rep. 621 (8th Cir. 1958); *affirmed*, 358 U.S. 1, 3 Race Rel. L. Rep. 855 (1958)], but rather to violate the due process and equal protection clauses of the Fourteenth Amendment, and therefore not to confer authority on the governor to close Little Rock high schools. Act No. 5, as amended, was held to be complementary to and dependent upon the invalid Act No. 4 and incapable of standing alone and was, therefore, declared invalid also and ineffectual to authorize the State Board's action during the 1958-59 school year in withholding and diverting funds allocable to the Little Rock School District. Further diversion of such funds was enjoined, and defendants were enjoined from impeding or thwarting the approved Little Rock integration plan which they were continued under court mandate to effectuate. [For previous developments, see 3 Race Rel. L. Rep. 621, 851-895, 1135 (1958) and 4 Race Rel. L. Rep. 17 (1959)].

Before SANBORN, Circuit Judge, and MILLER and BECK, District Judges.

PER CURIAM.

This case was tried and argued to this statutory three-judge court on May 4, 1959, upon the issues raised by the supplemental complaint of the plaintiffs and the answers of the defendants. The action is a class action brought by school-

age children of the Negro race and their parents and guardians, all residents of Little Rock, Arkansas. Declaratory and injunctive relief is sought against the defendants, State officers of the State of Arkansas, upon the claim that Act No. 4 of the Second Extraordinary Session of

the Sixty-first General Assembly, 1958, of that State, pursuant to which the Governor on September 12, 1958, closed the four senior public high schools of Little Rock, both Negro and white, is unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that Act No. 5 of the same Session, as later amended, by virtue of which state funds allocable to the Little Rock School District for the maintenance and operation of its public schools have been withheld from the District and diverted to other schools, is likewise unconstitutional and void.

The defendants are the Governor of Arkansas, the State Commissioner of Education, the members of the State Board of Education, the Superintendent of the Little Rock Public Schools, the members of the Board of Directors of the Little Rock School District, and other State officers asserted to have a relation to the case.

[Plaintiffs' Allegations]

In their supplemental complaint, the plaintiffs allege:

"Acts No. 4 and 5, as amended by Act 151 of the Arkansas Acts of 1959, are part of a studied plan devised by the Governor and General Assembly of Arkansas to preserve racial segregation in the public schools and thus evade or frustrate compliance with the decision of the Supreme Court of the United States in the School Segregation Cases and, more specifically, the decrees of this Court, the Court of Appeals and the Supreme Court in the instant case. Each order of the federal courts to implement the constitutional rights of plaintiffs and others similarly situated to an unsegregated education has been met by action of the legislative and executive departments of Arkansas designed to nullify those orders. (Report of the Governor's Committee to Make Recommendations for Official Action, February 24, 1956; Constitutional Amendment No. 44 to the Constitution of Arkansas, adopted Nov. 6, 1956; Arkansas Statutes 1947, §§ 6-801 to 6-824; Arkansas Statutes 1947, §§ 80-1519 to 80-1525, Acts No. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 of the General Assembly of Arkansas, 2nd Extraordinary Session 1958, approved September 12, 1958.)

"The State of Arkansas has undertaken as

a state function to provide a system of free public schools for the education for all persons between the ages of six and twenty-one years. Arkansas Constitution Article 14, § 1.

"Acts No. 4 and 5 as amended by Act No. 151 of the Arkansas Acts of 1959, in authorizing the closing of the public high schools of the Little Rock School District, the withholding of funds from them because they were in the process of being desegregated pursuant to Court order, and the payment of said funds to 'nonprofit private' schools which enroll pupils who formerly attended the schools now closed, is designed to nullify the orders of this Court and to condition the maintenance of public schools upon their operation in an unconstitutional manner and upon the waiver by plaintiffs of rights secured to them by the Constitution of the United States, all in violation of rights, privileges and immunities guaranteed to plaintiffs by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."

The plaintiffs ask this Court to declare Act No. 4 and Act No. 5, as amended, unconstitutional; to enjoin the defendants and those in concert with them from enforcing or seeking to enforce the Acts in question; to enter a judgment ordering that the public schools in Little Rock be opened, operated and maintained on a non-segregated basis in accordance with the previous orders of the United States Courts in that regard; and to enjoin the defendants from further acts to prevent the carrying out of such federal court orders.

[History Reviewed]

The complete history of this controversy from its inception to September 12, 1958, has been stated by the Supreme Court of the United States in its opinion in *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, unanimously affirming the United States Court of Appeals for the Eighth Circuit, 257 F.2d 33, in reversing an order of the United States District Court, 163 F.Supp. 13, suspending the approved plan of gradual integration for the period of two and one-half years.

The Supreme Court had on September 12, 1958, in that case, entered an order reading as

follows, at page 5 of 358 U.S., at page 1403 of 78 S.Ct.:

"It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated August 18, 1958, [257 F.2d 33] reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, [163 F.Supp. 13] be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, [see 143 F.Supp. 855] and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, be reinstated. It follows that the order of the Court of Appeals dated August 21, 1958, staying its own mandate is of no further effect.

"The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas."

Upon the entry of that order, the Little Rock School Board and the Superintendent of Schools were again under mandate to carry out the approved plan of integration of the schools of Little Rock.

[Court of Appeals' Opinion]

The further history of this litigation and its factual background is to be found in the opinion of the Court of Appeals for the Eighth Circuit, of November 10, 1958, in *Aaron v. Cooper*, 261 F.2d 97. That court points out that after its opinion of August 18, 1958 (257 F.2d 33), holding to be legally unwarranted the 2½-year suspension of the approved plan of integration granted by the District Court in 163 F.Supp. 13, the Governor of Arkansas called the General Assembly into extraordinary session; that on August 26, 1958, it passed, with emergency clauses, the two Acts in question, which, however, were not signed by the Governor until September 12, 1958, the day the Supreme Court of the United States entered its order in *Cooper v. Aaron*, affirming the decision of the Court of Appeals for the Eighth Circuit, 257 F.2d 33; that on the same day, acting under the authority purportedly conferred upon him by Act No. 4, the Governor

issued a proclamation closing all of the senior high schools of Little Rock, and called for an election in the School District, to vote on the alternative ballot proposition of "For Racial Integration of All Schools Within the _____ School District" or "Against Racial Integration of All Schools Within the _____ School District"; that Act No. 4 provided that, unless a majority of the qualified electors of the District voted in favor of integration, "no school within the district shall be integrated," and that a school closed by executive order authorized by the Act "shall remain closed until such executive order is countermanded by proclamation of the Governor"; and that the vote at the election was about 19,000 against, and 7,500 for, racial integration of all schools in the Little Rock School District (page 101 of 261 F.2d).

[Regarding Act No. 5]

Speaking of Act No. 5, the Court of Appeals said, on page 99 of 261 F.2d:

"Act No. 5 was complementary to Act No. 4, in its provisions for withholding from a school district, in which the Governor had ordered a school closed, a pro rata share of the State funds otherwise allocable to such district and of the funds allocable from the County General School Fund, and making such withheld funds available, on a per capita basis, to any other public school or any non-profit private school accredited by the State Board of Education (of which the Governor was a member), which should be attended by students of a closed school, with an obligation being imposed upon the State Board of Education in these circumstances to make such payments. §§ 2 and 3."

While the Court of Appeals expressed no opinion with respect to the constitutionality of Acts No. 4 and 5, it ruled that the Little Rock School Board, which was under mandate of the federal District Court to effectuate the plan for the gradual integration of the public schools of Little Rock approved by that Court in *Aaron v. Cooper*, 143 F.Supp. 855 (affirmed in *Aaron v. Cooper*, 8 Cir., 243 F.2d 361), could not lease the high school buildings of the District to a Private School Corporation for the operation of schools on a segregated basis, nor could the School Board otherwise disable itself from car-

rying out the court-approved plan of integration.

The District Court was directed by the Court of Appeals to enjoin the School Board, its members, and their successors, from transferring the high schools or other property of the District for the carrying on of any segregated school operations of any nature and to provide that the Board and its members and their successors "shall take such affirmative steps as the District Court may hereafter direct, to facilitate and accomplish the integration of the Little Rock School District in accordance with the Court's prior orders" (page 108 of 261 F.2d).

[*Garrett v. Faubus*]

The Supreme Court of Arkansas on April 27, 1959, by a four-to-three majority, in the case of *Garrett v. Faubus*, Ark., 323 S.W.2d 877, 884, held that Act No. 4 did not conflict with any provision of the Constitution of the State of Arkansas or with the Constitution of the United States. Justice Ward wrote the opinion of the Court. Justice Robinson and Chief Justice Harris each wrote a concurring opinion.

The four justices of that Court who believed that the Act was valid both under the Constitution of Arkansas and the Constitution of the United States were of the view that the Act represented a reasonable and proper exercise of the police power of the State to meet a temporary emergency, and—to quote from the opinion of Justice Ward—"to protect the peace and welfare of the people, and to effect a workable solution of this momentous problem [integration of the schools]—all within the framework of the Brown opinion [*Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083]."

Justice Robinson, in his concurring opinion, had this to say (page 892 of 323 S.W.2d):

"* * * In order to prevent violence that would be brought about by sending the Negro children to White schools, and to prevent the use of armed troops in the school buildings and on the school grounds, the Legislature authorized the Governor to close the school affected. But, undoubtedly, the General Assembly felt that if a majority of the voters, including Negro voters (who constitute a large percentage of the total electors in Little Rock), felt that the schools should be opened, then the schools could

be conducted without the use of troops and United States Marshals. Act No. 4, therefore, provides for an election to determine if the people wanted the schools opened. Such an election was held, and the vote was overwhelming in favor of keeping the schools closed."¹

Chief Justice Harris was also of the view that Act No. 4 represented a valid exercise of the police power of the State to meet a situation "sufficiently inimical to the public safety and welfare to justify the legislation * * *."

[*Dissent in Garrett Case*]

Justice McFaddin, in his dissenting opinion, expressed the view that Act No. 4 was violative of Section 1 of Article 14 of the State Constitution providing that " * * * the State shall ever maintain a general, suitable and efficient system of free [public] schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction," and opposed to decisions of the Arkansas Supreme Court construing that provision of the Arkansas Constitution.

Among other things, Justice McFaddin said (page 900 of 323 S.W.2d):

"* * * If the People of Arkansas want to strike Art. 14 from the Constitution, then the schools may be closed under some legislation similar to Act No. 4. But until Art. 14 of the Constitution is repealed, then it is my solemn and sincere view that Act. No. 4 is violative of the Arkansas Constitution."

He expressed the view that the police power of a state may not be used to invade or impair the liberty of citizens guaranteed by the State Constitution, and said: "In short, the Arkansas Legislature cannot, under the guise of the police power, enact legislation contrary to the Arkansas Constitution." He stated that the situation with which the Court was dealing was not the kind of an emergency that permits the use of "Emergency Police Powers," and further said, in that regard: "Rather, we are dealing with a condition that has already existed since 1954 and will continue to exist until either the

1. It is to be noted that the only choice given voters under Act No. 4 was to vote either for or against "Racial Integration of All Schools * * *" and not upon the question of having the schools open or closed.

United States Constitution is amended or the United States Supreme Court overrules *Brown v. Board of Education*."

[*Arkansas Constitution Requirement*]

Apparently, all of the State Justices were agreed that Section 1 of Article 14 of the Constitution of Arkansas requires the continued maintenance by the State of free public schools. In Justice Ward's opinion, in which Justice Robinson and Chief Justice Harris concurred, it is said (pages 880-881 of 323 S.W.2d):

"* * * If Act 4 is viewed as giving the Governor the power to close all public schools permanently, it would, we concede, be in violation not only of the decree in the *Brown* case [*Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083] but also of the State Constitution, but we do not consider it that way. * * * we take it as well understood that the Act was intended to slow down the implementation of integration until it could be accomplished without great discomfort and danger to the people affected or until a lawful way could be devised to escape it entirely. * * *

[*Cooper v. Aaron Quoted*]

As we read the opinion of the Supreme Court of the United States in *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5, it, in effect, holds that no lawless violence or threat, fear or anticipation of such violence, resulting from hostility to the integration of its schools, can justify any State, under the guise of the exercise of its police power, in depriving citizens, either temporarily or permanently, of rights guaranteed them by the Constitution of the United States. The Court said (pages 16-17 of 358 U.S., page 1409 of 78 S.Ct.):

"The constitutional rights of respondents [*Aaron, et al.*] are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as

this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Buchanan v. Warley*, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

"The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' *Ex parte Virginia*, 100 U.S. 339, 347, 25 L.Ed. 676. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667; *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792; *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; or whatever the guise in which it is taken, see *Derrington v. Plummer*, 5 Cir., 240 F.2d 922; *Department of Conservation and Development v. Tate*, 4 Cir., 231 F.2d 615. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color de-

clared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' *Smith v. Texas*, 311 U.S. 128, 132, 61 S.Ct. 164, 166, 85 L.Ed. 84."

[Justice Frankfurter's Opinion]

Mr. Justice Frankfurter, in his concurring opinion, said (pages 21-22 of 358 U.S., page 1411 of 78 S.Ct.):

"The use of force to further obedience to law is in any event a last resort and one not congenial to the spirit of our Nation. But the tragic aspect of this disruptive tactic was that the power of the State was used not to sustain law but as an instrument for thwarting law. The State of Arkansas is thus responsible for disabling one of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty. Accordingly, while Arkansas is not a formal party in these proceedings and decree cannot go against the State, it is legally and morally before the Court.

"We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the Constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the Board of Education had formulated, what the District Court in 1955 had directed to be carried out, and what was in process of obedience. No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy. . . ."

See, also, *Faubus v. United States*, 8 Cir., 254 F.2d 797, 807.

[Police Power in Emergency]

The deplorable conditions which were found by the Honorable Harry J. Lemley, United States District Judge, to have existed at Little Rock Central High School during the 1957-58

school year, when nine Negro students were enrolled in the formerly all-white school attended by about 2,000 pupils, and which he honestly and sincerely believed justified granting a 2½-year moratorium to the School Board in the carrying out of its plan of integration (*Aaron v. Cooper*, D. C., 163 F.Supp. 13), were held insufficient to support his order both by the Court of Appeals (8 Cir., 257 F.2d 33) and by the Supreme Court of the United States (358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed2d 5). If the factual situation as found by Judge Lemley, whose fact findings have never been questioned, were insufficient to sustain his order, we can see no basis whatever for a ruling by us that Act No. 4 constitutes a valid and reasonable exercise of the police power of Arkansas to meet an emergency.

" . . . Every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." *Plessy v. Ferguson*, 163 U.S. 537, 550, 16 S.Ct. 1138, 1143, 41 L.Ed. 256. See and compare, *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

[Act No. 4 Unconstitutional]

With all due respect to the considered views of those Justices of the Supreme Court of Arkansas who concluded that Act No. 4 represented a valid exercise of the police power of the State and therefore did not violate the Fourteenth Amendment to the Constitution of the United States, we are firmly of the opinion that Act No. 4 cannot be sustained upon that ground, and is clearly unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment, and conferred no authority upon the Governor to close the public high schools in Little Rock.

The Supreme Court of Arkansas, in the case of *Fitzhugh v. Ford*, Ark., 323 S.W.2d 559, in a unanimous opinion filed on May 4, 1959, held that Act No. 5 violates no part of the Constitution of the State of Arkansas, but did not consider whether it violated any part of the Constitution of the United States. The Court said (page 560 of 323 S.W.2d):

"In essence, Act 5 provides: (a) It requires the Commissioner of Education to withhold certain *State Funds* (otherwise

allocable to a school district wherein a school has been closed under said Act 4) in an amount calculated on a certain pro rata basis, the correctness of which is not challenged here and which is not material to this opinion; (b) It requires the Commissioner of Education to pay over to other *public schools or non-profit private schools* accredited by the State Board of Education from the funds so withheld an amount calculated on a pro rata basis according to the number of students (from the closed schools) attending a recipient school. Simply and briefly stated, Act 5 provides that the money which normally would be spent on a student in a closed school would be paid to the school which he might later attend."

[Act No. 5 Invalid]

Since Act No. 5 is complementary to and dependent upon Act No. 4, and that Act is invalid, it follows that Act No. 5 is also invalid and completely ineffectual. We are satisfied that Act No. 5, as amended, cannot stand alone and did not, and does not, authorize the State Board of Education to deprive the Little Rock School District of State funds allocable to it for the maintenance of its schools on a constitutional basis, or to divert any part of those funds to other schools or other districts.²

2. Sections 2 and 3 of Act No. 5 of the Acts of the 2nd Extraordinary Session of the 61st General Assembly of Arkansas, approved September 12, 1958, as amended by Act No. 151 of the General Assembly for the year of 1959, approved March 3, 1959, read as follows:

"Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, or whenever any person of school age shall be accepted for enrollment in any school other than the one in which he normally would attend, the State Board of Education, acting through its Commissioner of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such closed school, or over any such school which any such person of school age normally would attend, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school, or in the school which any such person would normally attend, bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order, or next preceding the date of acceptance for enrollment of any

There is no dispute as to the facts. The Little Rock public high schools were closed by the Governor, under Act No. 4, on September 12, 1958, before they were opened for the admission of students, and have remained closed ever since. The School Board has been precluded, by the closing of the public high schools, from carrying out its approved plan of gradual integration ordered into effect by the federal courts.

By virtue of Acts No. 4 and No. 5, as amended, \$350,586 in funds allocable to the Little Rock School District had been withheld up to May 4, 1959. The total amount which will be withheld by the end of the 1958-59 school year, if these Acts remain in effect, will be slightly in excess of \$510,000. Of the funds withheld, \$187,768 has been paid to other schools, public and private, in accordance with Act No. 5. Of this amount, \$71,907.50 was paid to the private Raney High School.

The total number of prospective high school students registered for the four high schools in Little Rock as of September, 1958, was 3,665. Of these, after the closing of the high schools by the Governor, 266 white students and 376 Negro students did not attend any school; the remainder transferred to private schools in Little Rock and to public and private schools within or without the State. The evidence shows where the white students went and where the Negro students went, but we find it unnecessary to go into that detail.

such student in the school which he normally would attend for the benefit of the said school district for maintenance and operation; plus, also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education.

"Section 3. Should any of the students of any school so closed by order of the Governor, or any of the students eligible to attend any racially integrated school, determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of transferred students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds from time to time made available to the State Board of Education, including but not limited to those contained in Act 305, approved March 27, 1957, shall be useable for the purposes herein provided."

The purpose, effect, and results of the enactment and enforcement of Acts No. 4 and No. 5 are too obvious to require further discussion.

[Declaratory and Injunctive Relief]

It is the judgment and declaration of this Court: that Act No. 4 of the Second Extraordinary Session of the General Assembly of Arkansas, 1958, is unconstitutional and invalid; that the proclamation of the Governor of Arkansas closing the public high schools in Little Rock was and is void; that Act No. 5, as amended, as a device of depriving the Little Rock School District of State funds allocable to it for the maintenance of its schools upon a constitutional basis, is also unconstitutional and invalid; that the diversion of such funds pursuant to Act No. 4 and Act No. 5 should be and is hereby permanently enjoined; that the Superintendent of the Schools of Little Rock, and the members of the Board of Directors of the Little Rock School District, and their successors, are under the continuing mandate of this District

Court to effectuate the plan of integration for the public schools of Little Rock approved by this Court in *Aaron v. Cooper*, D.C., 143 F.Supp. 855 (affirmed, 8 Cir., 243 F.2d 361); and that this Court has heretofore retained jurisdiction to require the Superintendent and the School Board to take such affirmative steps as may hereafter be directed by this Court to accomplish the integration of the schools of Little Rock in accordance with and as required by the prior orders of this Court, and the orders and decisions of the Court of Appeals for the Eighth Circuit and of the Supreme Court of the United States.

It is further adjudged that the defendants and their successors in office be and are permanently enjoined from engaging in any acts which will, directly or indirectly, impede, thwart, delay or frustrate the execution of the approved plan for the gradual integration of the schools of Little Rock, the effectuation of which has been heretofore commanded by the orders of this Court.

The motions of the defendants to dismiss the supplemental complaint, which were taken under submission by the Court, are overruled.

EDUCATION Public Schools—Arkansas

L. R. FITZHUGH, et al. v. Arch FORD, Commissioner, et al.

Supreme Court of Arkansas, May 4, 1959, 323 S.W.2d 559.

SUMMARY: The 1958 Extraordinary Session of the Arkansas General Assembly enacted legislation providing that, in the event of the closing of a school by the governor, state funds that normally would be spent on a student attending such school should be diverted to any other accredited public or non-profit private school which he might later attend. 3 Race Rel. L. Rep. 1043 (1958). Certain resident citizens and taxpayers of the Little Rock School District filed a petition in a state chancery court to have the state commissioner of education and the state disbursing agent enjoined from executing the act, which was alleged to contravene the state Constitution. Defendants' demurrer was sustained and the petition was dismissed. On appeal, the Arkansas Supreme Court affirmed, holding that: (1) Article 12, Section 12 of the state Constitution prohibiting the state's assumption or payment of a debt or liability of a political subdivision or corporation except to provide for the public welfare and other stated purposes is not violated by a payment of public school funds to a private school because the transactions covered by the act do not create a debt or liability on the part of the private schools for the state to assume or pay; (2) Article 16, Section 11, providing that "no money arising from a tax levied for one purpose shall be used for any other purpose" is not violated, because the practice of transferring a student in one school district to a school in another district accompanied by his portion of the tax fund so as not to affect adversely

the finances of the latter district had long been sanctioned by legislative enactment and judicial decisions as not a diversion of funds; and (3) amended article 16, Section 1, prohibiting the state from lending "its credit for any purpose whatever" is not violated, credit not being involved because money will not be spent until collected and appropriated.

WARD, Justice.

This appeal challenges the (Arkansas) constitutionality of Act 5 passed by the 1958 Second Extraordinary Session of the General Assembly, which Act provides for the allocation of certain school funds for the benefit of those students who attended the schools closed under Act 4 of the same session of the General Assembly.

On September 16, 1958, L. R. Fitzhugh, et al., being resident citizens, taxpayers and electors of the Little Rock School District, filed a petition in Chancery Court against Arch Ford as Commissioner of Education and Joe L. Hudson, the disbursing agent, alleging that said Act 5 violated Article 12, Section 12; Article 16, Section 11, and: Article 16, Section 1 (as amended by Amendment 13), and that the defendants will unlawfully withhold and redistribute state funds unless enjoined from doing so. The prayer was in accordance with the above allegations.

On September 30, 1958, defendants demurred to the petition on the ground that it did not state a cause of action. Upon the court sustaining the demurrer and upon the petitioners' refusal to plead further, the petition was dismissed, and this appeal follows.

[Act 5 Summarized]

In essence, Act 5 provides: (a) It requires the Commissioner of Education to withhold certain *State Funds* (otherwise allocable to a school district wherein a school has been closed under said Act 4) in an amount calculated on a certain pro rata basis, the correctness of which is not challenged here and which is not material to this opinion; (b) It requires the Commissioner of Education to pay over to other *public schools* or *non-profit private schools* accredited by the State Board of Education from the funds so withheld an amount calculated on a pro rata basis according to the number of students (from the closed schools) attending a recipient school. Simply and briefly stated, Act 5 provides that the money which normally would be spent on a student in a closed school would be paid to the school which he might later attend.

It is contended by appellants that Act 5 violates the three sections of the Arkansas Con-

stitution set out above, and we will discuss them separately in the order mentioned.

[Arkansas Constitution, Article 12]

1. Article 12, Section 12, in relevant part provides:

"Except as herein otherwise provided, the State shall never assume or pay the debt or liability of any county, town, city, or other corporation whatever, or any part thereof, unless such debt or liability shall have been created to repel invasion, suppress insurrection or to provide for the public welfare and defense."

Appellants' argument in relation to the above section is directed only to the payment of public school funds to a *private school*. Frankly, we are unable to see how the transactions contemplated under Act 5 create a debt or liability on the part of a non-profit private school. If a student from a closed school attends such a private school, any resulting debt or liability would be payable to the school, not by it. Consequently there would be no school debt or liability for the State to assume or pay. There might, of course, be a debt owing by the student to the school, and if we can imagine a student being placed in the category of a "county, town, city, or other corporation", even then the payment by the State of such a debt has often been approved by our legislature without challenge as to legality. Act 382 of 1947 (now repealed) provided for the state to pay the expenses of World War II veterans who might wish to study veterinary medicine, dentistry, architecture, etc., in schools outside the State of Arkansas. For that purpose \$100,000 was appropriated from the General Revenue Fund. Act 243 of 1957 makes similar provisions without restrictions as to courses pursued. Act 313 of 1945 (Ark. Stats. §§ 78-1601, 78-1604) empowers the State to make leases to the Arkansas Livestock Show Association, a private organization, and to furnish money "for the purpose of paying premiums * * *". These and other acts that might be cited are not relied on primarily to sustain the constitutionality of Act 5 but to show a trend or policy that was adopted by the State long before Act 5 was enacted.

[Article 16, Section 11]

We do not agree with the contention by appellants that Act 5 violates Article 16, Section 11, of the State Constitution. This section reads: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose." The portion emphasized is what appellants believe to be relevant here. Nor do we agree with appellants that *Page v. Alexander*, 206 Ark. 479, 177 S.W.2d 415, sustains their contention, because the facts were entirely different. In the *Page* case this court, in construing Act 187 of 1943 which directs that a certain per centum of the sales tax should go to "cities and counties," held it did not include funds accruing before the effective date of the Act. It will be noted that Act 5 deals only with *State Funds* allocable to individual school districts. So, when a portion of the money allocated to a particular school district follows a student from that district to another school, the finances of no other school district are affected adversely. Legally this amounts to nothing more than transferring a student in one school district to a school in another district accompanied by his portion of the tax fund, which has long been sanctioned by legislative enactment and by this Court. See: Ark.Stats. § 80-1517, *Jones v. Floyd*, 129 Ark. 185, 195 S.W. 360, and *Van Buren County Board of Education v. Suggs*, 183 Ark. 535, 37 S.W.2d 703. We also held in *Ruff v. Womack*, 174 Ark. 971, 298 S.W. 222, under facts much more favorable to appellants than those of this case, that there was no diversion of funds and hence no violation of Article 14, Section 2 of our Constitution. This section is very similar to, if not in effect the same as, the section here under consideration.

[Article 16, Section 1 (Amended)]

3. Finally, appellants say Act 5 violates Article 16, Section 1 (as amended by Amendment No. 13) of the Constitution. As stated by appellants, the relevant portion of the above section prohibits the State from lending "its credit for any purpose whatever." Appellants have failed to point out the manner in which the State would be lending its credit under the provisions of Act 5, and we can think of none. In fact we fail to see how credit is in any way in-

volved. No money will be expended until after it has been collected and appropriated. All the decisions of this court approaching the issues here that we have been able to find are contrary to appellants' contention. See: *Hays v. McDaniel*, 130 Ark. 52, 196 S.W. 934; *Schmutz v. Special School District of Little Rock*, 78 Ark. 118, 95 S.W. 438; *Lackey v. Fayetteville Water Company*, 80 Ark. 108, 96 S.W. 622; *Board of Directors of Jefferson County Bridge District v. Collier*, 104 Ark. 425, 149 S.W. 66; and *Halbert v. Helena-West Helena Industrial Development Corporation*, 226 Ark. 620, 291 S.W.2d 802.

Affirmed.

McFADDIN, J., concurs.

McFADDIN, Justice (concurring).

As stated in my dissenting opinion in *Garrett v. Faubus*, Ark., — S.W.2d —, I regard Act No. 4 of the Second Extraordinary Session of the 1958 Legislature to be violative of Section 1, Article 14 of the Arkansas Constitution; and I think the entire plan of closing the schools should be declared unconstitutional. I continue to adhere to the views so expressed. If those views had prevailed, the Act No. 5, here involved, would fall, because it would have no foundation with Act No. 4 stricken.

But, even so, in *Garrett v. Faubus*, a majority of this Court held that the Act No. 4 was constitutional for the "present emergency". In view of such holding, I certainly think Act No. 5 should be sustained. It is a serious effort to help provide schooling for children whose schools have been closed. Of course, the schools should not have been closed, but they have been; and in Act No. 5 the State has recognized its duty to provide education. Act No. 5 applies only to State funds—not to the millage funds voted in the school district.

We have in equity the doctrine known as *cy-pres*, which means, "as near as possible". I think Act No. 5 should be upheld under the doctrine of *cy-pres*. It is an attempt to provide education "as near as possible". It is no more a diversion of State funds than the application of the equitable doctrine of *cy-pres* is a diversion of the original trust funds.

So, even though I regard Act No. 4 as unconstitutional, I nevertheless think that Act No. 5 should be upheld, since the majority has refused to go along with me in my views on Act No. 4.

EDUCATION

Public Schools—Arkansas

Mrs. Gertie GARRETT v. Orval E. FAUBUS, Governor of Arkansas.

Supreme Court of Arkansas, April 27, 1959, 323 S.W.2d. 877.

SUMMARY: Act 4 of the Second 1958 Extraordinary Session of the Arkansas General Assembly, approved September 12, 1958, provides procedures whereby the governor may, upon certain determinations, order public schools closed. 3 Race Rel. L. Rep. 1048 (1958). Also on September 12, 1958, Governor Faubus, pursuant to the Act, issued a proclamation closing the public senior high schools of the Little Rock School District, reciting in terms of the Act that he had determined that "domestic violence" was "impending" within that district and that "a general, suitable, and efficient educational system cannot be maintained . . . because of integration of the races" in such schools. 3 Race Rel. L. Rep. 869 (1958). Again, on September 12, 1958, a citizen-taxpayer filed a complaint in a state chancery court against the governor, praying for a declaratory judgment that Act 4 is in violation of both state and federal constitutions and for a mandatory injunction directing the governor to vacate and nullify the proclamation. A demurrer was sustained, and plaintiff appealed to the Arkansas Supreme Court, which affirmed, three justices dissenting. It was held that the state constitutional requirement that "the State shall ever maintain a general, suitable and efficient system of free schools" was not violated, as such provision was ruled not to require "schools to be maintained in any fixed number at any fixed standard, or in any fixed places." The court also held that the Fourteenth Amendment was not violated by the Act because as a temporary measure it was constitutional under the police power of the state legislature to act to "protect the peace and welfare of the people." Stating that "the [Supreme] court itself in the Brown case recognized some consideration must be given to local conditions and customs in the implementation of its opinion, we are driven to the conclusion that there is . . . a large sphere of action available to the State Legislature under its police power to guide . . . a peaceable, safe course for its implementation."

WARD, Justice.

On this appeal it is contended that Act 4 of the Second Extraordinary Session of the 1958 General Assembly is in conflict with the Constitution of Arkansas and the Constitution of the United States.

Briefly and generally stated, said Act 4 gives the Governor the right to close any school or schools in any particular school district whenever: (a) He determines there is actual or impending domestic violence endangering lives or property; (b) Federal troops are stationed in, on or about a public school; (c) He determines an efficient educational system cannot be maintained because of integration of the races in school. The Act also provides: In the event of a closing, an election shall be held within 30 days and if a majority so vote the school or schools shall be opened on an integrated basis; If any superintendent, or other employee of the school fails to cooperate in carrying out the closing order he or they will be replaced by the Governor until the next regular school

election; Any schools so closed shall not be reopened except by the Governor; If any section or provision of the Act is held unconstitutional it will not affect the remaining portions; and: The provisions of the Act shall be activated by proclamation of the Governor. The emergency clause sets forth the reasons for the passage of the Act and its immediate effective date.

[Orders Schools Closed]

On September 12, 1958, the Governor, pursuant to the provisions of the above Act, ordered the Senior High Schools in the Little Rock School District closed as of September 15, 1958, at 8:00 o'clock a. m. The reasons given by the Governor for the closing order, as they are set out in his proclamation, were: "I have determined that domestic violence within the Little Rock School District is impending, and that a general, suitable, and efficient educational system cannot be maintained in the Senior High Schools of the Little Rock School District because of integration of the races in such schools."

On the same day the proclamation was issued, appellant, as a citizen and taxpayer, filed a complaint against the Governor alleging that Act 4 violated the Constitution of the United States and the Constitution of Arkansas, and particularly Article 14 of the latter Constitution. The prayer was that, in event the schools were closed, a mandatory injunction issue against the Governor directing him to vacate and nullify the proclamation. The court was also asked to enter a declaratory judgment construing the constitutionality of Act 4.

To the above complaint demurrers were filed by the Attorney General and also by appellee's private attorneys on the ground that the complaint failed to state a cause of action. The private attorneys also denied that the trial court had jurisdiction of appellee or the subject matter, and the Attorney General joined appellant in requesting a declaratory judgment. The trial court sustained the demurrer filed by the Attorney General, and dismissed the complaint—hence this appeal.

[Appellant's Only Ground]

The only ground relied on by appellant for a reversal is thus stated in her brief:

"Act 4 of the Extraordinary Special Session of the General Assembly of Arkansas for 1958, is unconstitutional in that it violates Article 14 of the Constitution of Arkansas. Hence any act of the Governor based upon Act 4 is void for lack of constitutional authority, same being in violation of said Article 14 of the State Constitution."

The brief filed by *amicus curiae* attorneys, however, assumes that Act 4 will be considered in relation to both the State and Federal Constitutions and it is our purpose to do so.

Does the Act Violate the State Constitution?

In our opinion Act 4 does not necessarily violate the State Constitution. We use the word "necessarily" advisedly. It is a well-established principle of law that an Act of the Legislature which is constitutional on its face may become unconstitutional in its operation or under changed conditions. The landmark case announcing this principle is *Yick Wo v. Hopkins*, 118 U.S. 356, quoting from page 373, 6 S.Ct. 1064, page 1073, 30 L.Ed. 220:

"Though the law itself be fair on its face, and impartial in appearance, yet, if it is

applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

Essentially the same principle was announced by this court in *Board of Trustees, University of Ark. v. Pulaski County*, 315 S.W.2d 879, 882, in these words: "The principle is well settled that a statute may be valid when enacted but may become invalid by changes in the conditions to which it applies." In *Taylor v. City of Pine Bluff*, 226 Ark. 309, 289 S.W.2d 679, 680, we quoted with approval "that purposeful discrimination in the enforcement of an ostensibly fair law may violate the constitution. If the unlawful administration of the statute results 'in its unequal application to those who are entitled to be treated alike,' there is a denial of equal protection." Since Act 4 is unquestionably an attempt to exercise the police powers of the State about which more will be said later, and since this case comes to us on a demurrer, and since acts of the Legislature are presumed to be constitutional, it is not incumbent on us to speculate on facts that might tend to invalidate this Act. In this connection, in the case of *Harlow v. Ryland*, D.C., 78 F.Supp. 488, 493, affirmed 8 Cir., 172 F.2d 784, the court, in considering the validity of a statute said: "• • • it is not incumbent upon the court to find the actual existence of facts which would justify the legislation; but if a state of facts which would justify the legislation can reasonably be conceived to exist, the court must presume that it did exist and that the law was passed for that purpose."

[Remaining Question]

The remaining question then is: Does Act 4, on its face, violate Section 1 of Article 14 of our State Constitution, as claimed by appellant? This section reads:

"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

It is our conclusion that no such constitutional violation exists. Article 14, Section 4, of our Constitution reads: "The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly." Therefore, from a strictly constitutional standpoint, the Legislature had the same right to authorize the Governor to take charge of schools as it has always exercised to authorize school boards to do so. There is nothing in the Constitution requiring schools to be maintained in any fixed number at any fixed standard, or in any fixed places. If it did and if the requirements were those existing on September 27, 1958, then the Constitution has been flagrantly violated for more than 75 years following 1874.

We have read with much interest the case of *Harrison v. Day*, 106 S.E.2d 636, 637, 647, decided January 19th of this year, where the Supreme Court of Virginia held several segregation acts in conflict with the Constitution of that state. Section 129 of the Virginia Constitution, in language essentially the same as in Section 1, Article 14 of our Constitution, requires the State to maintain a system of free public schools. However, Section 133 of their Constitution places "The supervision of schools in each county and city . . . in a school board, to be composed of trustees . . ." etc. The court held that this provision prevented the Legislature from placing the supervision in the Governor. Of course no such restriction is found in our Constitution as we have already pointed out. It is interesting to point out that the Virginia Supreme Court, in considering an Act which permitted schools to be closed because of the presence of Federal Troops, had this to say: ". . . While we agree that the State, under its police power, has the right under these conditions to direct the temporary closing of a school, the provision divesting the local authorities of their control and vesting such authority in the Governor runs counter to Section 133 of the Constitution."

[No Constitutional Conflict]

We repeat that we find nothing in Act 4 which conflicts with Section 1, Article 14 of the Arkansas Constitution. The degree to which the police powers of the State may be extended will be further discussed later.

Regarding the United States Constitution. Technically speaking, the question posed for our solution is: Does Act 4 conflict with the first section of the 14th Amendment of the United States Constitution? This section, in substance, says: (a) All persons born or naturalized in the United States, and subject to its jurisdiction, are citizens; (b) No state shall make or enforce any law abridging the privileges or immunities of such citizen; (c) No state shall deprive such citizens of life, liberty, or property without due process of law, and; (d) No state shall deny such citizen equal protection of the laws. The Supreme Court of the United States in the case of *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 692, 98 L.Ed. 873 (on May 17, 1954) interpreted said section to forbid discrimination in the public schools. Ordinarily, it seems, that should have ended the matter because the law had been declared, but it did not. The court must have realized that the dosage was too potent for immediate administration, for it said: ". . . because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity" (our emphasis). For the above reason the court continued the matter for several months and gave all states permitting segregation an opportunity to be heard. After another hearing, the Court (349 U.S. 294, 75 S.Ct. 753, 755, 99 L.Ed. 1083) on May 31, 1955, handed down its final decision. Apparently the Court still recognized the dosage was too potent to be taken at one time without harmful after effects. Among other things it said:

"These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. . . ."

"Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems . . ."

"Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. . . ."

"In fashioning and effectuating the de-

crees, the courts will be guided by *equitable principles*. * * *

"These cases call for the exercise of these traditional attributes of *equity power*. * * *

"To effectuate this interest may call for elimination of a *variety of obstacles* in making the *transition* to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. * * *

"Courts of equity may properly take into account the *public interest* in the elimination of such obstacles in a systematic and effective manner. * * *

"Once such a start has been made, the courts may find that *additional time* is necessary to carry out the ruling in an effective manner. * * * (Our emphasis.)

[Judicial Discretion Delineated]

We have set out the above quotes because it appears that they delineate the only sphere of judicial discretion left to us. While we deeply deplore the fact that the Supreme Court of the United States did not follow the clear legal precedents announced in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, in *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, and in numerous other decisions over a period of fifty years, instead of a long list of non-legal authorities, yet this Court will be subservient to the decision it did reach unless and until relief is afforded by the United States Supreme Court itself, by amendment to the Federal Constitution, by the intervention of Congress under Section 5 of the said 14th Amendment, or by some other means not readily apparent. Much has been said about the *supreme law of the land* in connection with the issue before us now. While we can see no room for argument since Article 6 of the United States Constitution itself says it, together with laws passed by Congress and certain treaties, "*shall be the supreme Law of the Land.*"

Our Field of Interpretation. Notwithstanding what we have said above concerning the *supreme law of the land*, we feel that the issue before us falls within a sphere which allows this court some judicial discretion. That sphere is the application of the *police powers* of the state to the implementation of the decision in the *Brown* case, *supra*.

First, let us make our position clear. If Act 4 is viewed as giving the Governor the power to close all public schools permanently, it would, we concede, be in violation not only of the decree in the *Brown* case but also of the State Constitution, but we do not consider it that way. Without extending this opinion unduly by recounting all the history preceding and leading up to the passage of Act 4, we take it as well understood that the Act was intended to slow down the implementation of integration until it could be accomplished without great discomfort and danger to the people affected or until a lawful way could be devised to escape it entirely. In other words, the relief was intended to be temporary and not permanent. The terms of the Act itself bear out this interpretation.

[Nothing on Governor's Record]

There is nothing in the record to show what reasons the Governor had for believing that the peace would be disturbed or that the lives of citizens and property of the district would be endangered, and certainly there is nothing in the record to show his reasons were not well founded. Such being the case we will assume, as we have previously pointed out we may, that the Governor did not act capriciously.

If, in closing the schools temporarily, the Governor did so to protect the peace and welfare of the people, then he was justified, we think, under the well-recognized police powers of the State. We believe that if the legislature had given the Governor the power to close schools temporarily in case of pestilence or insurrection in order to protect the people, no question of constitutionality would or could be raised. The difference between the real and the supposed situation is not one of law but of fact and the only difference in fact is one of degree. While the decisions dealing with *police power* are legion, the fundamental concept underlying its principle is nowhere better stated than in 11 Am. Jur. under the title Constitutional Law. In Section 251 it is stated: " * * * the police power is expressed by the well-known maxim '*salus populi est suprema lex*' (The welfare of the people is the supreme law). It has been said that this maxim is the foundation principle of all civil government and that for ages it has been a ruling principle of jurisprudence." Also in the same text, Section 255, it is stated: "The police power under the American constitutional system

has been left to the states." Numerous footnote cases are cited in the text to support both propositions.

[Role of Emotions]

It makes no difference, we think, whether threat of the welfare of the people arises out of a pestilence or out of certain concepts of life that had formed over a period of years—even though these concepts may be based, as some insist, on prejudice or emotions. We believe it is common knowledge that people are most disturbed over emotional matters. The existence and extent of the emotional matters involved in the matter under discussion are too well known to need amplification.

Not only are the emotions and concepts mentioned above very real in the lives of the people of many sections of the nation, including this state, but we think they have been permitted and even encouraged by the same court that authored the Brown decision. A few excerpts from the opinions of the Supreme Court will suffice to explain. In the *Gong Lum* case, *supra*, where the court was dealing with the question of segregation, it said:

"* * * the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authority with the management of such schools cannot be justified * * *." [275 U.S. 78, 48 S.Ct. 93.]

In *Robinson v. Memphis & Charleston Ry. Co.*, 109 U.S. 3, 3 S.Ct. 18, 31, 27 L.Ed. 835, we find:

"* * * if the laws themselves make any unjust discrimination, amenable to the prohibitions of the fourteenth amendment, congress has full power to afford a remedy under that amendment and in accordance with it."

Much of the language used by the Court in the *Plessy* case, *supra*, must have been reassuring to the people for nearly fifty years. Some expressions of the court are set out, viz.:

163 U.S. at page 544, 16 S.Ct. at page 1140: "The object of the amendment (14th amendment U.S. Const.) was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to

abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of *separate schools for white and colored children*, which has been held to be a *valid exercise of the legislative power* * * *."

163 U.S. at page 550, 16 S.Ct. at page 1143: "So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a *large discretion on the part of the legislature*. In determining the question of reasonableness, it is at liberty to act with reference to the *established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.*"

163 U.S. at page 551, 16 S.Ct. at page 1143: "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro *except by an enforced commingling of the two races*. We cannot accept this proposition. If the two races are to meet upon terms of social equality, *it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.*"

The court in speaking of integration of the races said:

"* * * this end can neither be accomplished nor promoted by laws which *conflict with the general sentiment of the community upon whom they are designed to operate.*" (Emphasis supplied in each instance.)

In view of the overall situation as we have tried to point it out above, and having seen that

the court itself in the Brown case recognized some consideration must be given to local conditions and customs in the implementation of its opinion, we are driven to the conclusion that there is, and by law and common sense should be, a large sphere of action available to the State Legislature, under its police power, to guide the course of segregation so as to protect the public welfare. As before intimated, we are aware that neither this Court nor the Legislature can over-ride permanently the integration mandate, but some one must guide a peaceable, safe course for its implementation. Under veto power of the Supreme Court of the United States, we believe this course can better be charted by those closest to the people affected and therefore better acquainted with local conditions. It is within this framework that we uphold the constitutionality of Act 4 under the police power of the State Legislature.

[Earlier Judicial Statements]

It is in this connection also that we desire to stress what our courts, including the Supreme Court of the United States, have heretofore said:

Barbier v. Connolly, 1885, 113 U.S. 27, 5 S.Ct. 357, 359, 28 L.Ed. 923:

"But neither the amendment (14th)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its *police power*, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

State v. Mountain Timber Co., 75 Wash. 581, 135 P. 645, 648, L.R.A.1917D, 10:

"Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The *police power* is to the public what the *law of necessity* is to the individual. It is comprehended in the maxim, *Salus populi suprema lex*. It is not a rule; it is an evolution."

State v. Hay, 126 N.C. 999, 35 S.E. 459, 460, 49 L.R.A. 588, 78 Am.St.Rep. 691:

"*Salus populi suprema lex*,"—the public welfare is the *highest law*,—is the foundation principle of all civil government. . . . There is an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy, or even sacrificed, for the public good."

State v. Boone, 84 Ohio St. 346, 95 N.E. 924, 39 L.R.A.,N.S., 1015:

"The *police power* is inherent in sovereignty; and its exercise is justified by the necessity of the occasion. Its foundation is the right and duty of the government to provide for the common welfare of the governed. It is tersely expressed in the maxim, '*Salus populi suprema lex*'."

Davock v. Moore, 105 Mich. 120, 63 N.W. 424, 429, 28 L.R.A. 783:

"Whatever differences of opinion may exist as to the extent and boundaries of the *police power*, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. They belong emphatically to that class of objects which demand the application of the maxim, '*Salus populi suprema lex*'; and they are to be attained and provided for by such appropriate means as the legislature may devise."

People v. Linde, 341 Ill. 269, 173 N.E. 361, 563, 72 A.L.R. 997:

"The power that the state may exercise in this regard is the overruling law of *necessity* and is founded upon the maxim, '*Salus populi est suprema lex*.' The existence and exercise of this power are an essential attribute of sovereignty, and the establishment of government presupposes that the individual citizen surrenders all rights the exercise of which would prove hurtful to the citizens generally."

Bland v. People, 32 Colo. 319, 76 P. 359, 361, 65 L.R.A. 424, 105 Am.St.Rep. 80:

"*The welfare of the people is the supreme law*," is a maxim of the law, and it is upon these two maxims that the *police power* of the state is largely based. In the exercise of the *police power* the *Legislature has a large discretion*, and it is our *duty* to sustain such legislation unless it is clearly and palpably and beyond all question in violation of the Constitution." (Emphasis supplied in each instance.)

[Presents Social Problem]

That complete integration of the schools in many communities presents a social problem fraught with frightening consequences in the minds of many people is a fact that cannot be ignored or avoided. If those people are convinced they are being forced into acceptance, without time for adjustment, by a few people who are far removed from the scene and who, they feel, are not sympathetic or understanding, the problem becomes more frightening. On the other hand, if these same people were given assurance that they would be guided by understanding and sympathetic local officials, it would tend to allay their fears and also would, no doubt, hasten the day when a complete solution would be achieved with a measure of dignity, peace and harmony. It is in this concept that we rely so heavily on the police power of the State to protect the peace and welfare of the people, and to effect a workable solution of this momentous problem—all within the framework of the Brown opinion. It was to this end that Act 4 was passed by the Legislature and it is to this end that we hold it is constitutional.

In speaking of the deep and disturbing feelings of the affected people, we take judicial notice of numerous elections where the people have expressed their feelings in no uncertain terms, and also of the adoption of Amendment 44 to the State Constitution. Section 3 of that Amendment reads: "The General-Assembly shall enact such laws under the Police Powers reserved to the States as may be necessary to regulate health, morals, education, marriage, good order and to insure the domestic tranquility of the citizens of the State of Arkansas." Other portions of the amendment make it clear that the Legislature was not only empowered

but was directed to protect the safety and welfare of the people.

In view of what we have said it follows that the decree of the trial court must be, and it is hereby affirmed.

Affirmed.

HARRIS, C. J., and ROBINSON, J., concur.
HOLT, McFADDIN and GEORGE ROSE SMITH, JJ., dissent.

Concurring Opinion

HARRIS, Chief Justice (concurring).

The purpose of this concurrence is to state my own views relative to the Act here in question. My decision as to the validity of Act 4 is based purely and simply upon the State's police power. The right of the State to enact legislation as a means of protecting the health and safety of its citizens, is so well recognized as to really need no citation of authority, and this is true with reference to emergency legislation, though the legislative act may be in conflict with a constitutional provision. As stated in 16 C.J.S. Constitutional Law § 195, p. 945:

"Legislation may be enacted under the police power, in seasons of emergency, which would not be appropriate at other times, and such legislation is not invalid merely because it necessarily works a hardship on some individuals for a period of limited duration; but emergency does not justify destruction. Emergency legislation ordinarily contains a declaration that an emergency exists which is causing widespread distress to a large portion of the population with resulting danger to health, safety, or morals of the public generally, but the mere legislative declaration does not of itself create an emergency which will warrant the legislation. The actual existence of the emergency and not the limitation of the law's operation to a prescribed period, gives validity to an exercise of the police power, and, when the emergency ceases to exist, the operation of the statute will be arrested, even though the prescribed term of its operation may not then have expired."

This doctrine has been followed in any number of cases, one of the most celebrated being Home Building & Loan Ass'n v. Blaisdell, 290

U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, which case is cited in various decisions from state courts, including our own. The background is as follows. In 1933, this nation was in the throes of a terrible economic depression, and people who had mortgaged their homes, unable to pay the indebtedness for which the mortgages had been given, were losing their property through foreclosure proceedings. Various state legislatures enacted legislation designed to prohibit immediate foreclosures, and thus protect citizens from losing their homes. Among other states which enacted such legislation were Arkansas, Arizona, and Minnesota. The acts so passed by the General Assemblies of these states were attacked in the courts as unconstitutional, and Act 21 of the Arkansas General Assembly of 1933 was attacked on the ground that it was unconstitutional and void, because it conflicted with Section 17 of Article II of the Constitution of the State of Arkansas,¹ and further, the Act was in conflict with Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts. This Court passed upon these contentions in the case of *Reiman v. Rawls*, 188 Ark. 983, 68 S.W.2d 470, and in an opinion written by the late Mr. Justice Mehaffy, said:

"It is a matter of common knowledge that the present is a period of great depression and that land values have decreased until there is practically no market for such property. A home that was worth \$2,500 when mortgaged to secure a debt some years ago would not bring at foreclosure sale more than one-fourth of this amount, and in many cases much less. There is not only no market for land, but practically all the banks in the country have failed, and it is impossible to borrow money secured by mortgage or pledge of property, to pay debts, and thousands of people in Arkansas who were making a living prior to the depression have lost their jobs, are without work, and without means of support. Governments are created for the purpose of securing the rights of the citizens, and, if a government during a period of such depression as we now have could not protect its citizens, there would be no reason for its existence."

1. The pertinent part of Section 17 provides: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall ever be passed."

The opinion then quoted from the opinion of the Minnesota Supreme Court in the *Blaisdell* case [189 Minn. 422, 249 N.W. 334, 86 A.L.R. 1507] (which subsequently went to the United States Supreme Court) as follows:

"Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war, * * * earthquake, pestilence, famine, and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos,² demand the enactment of laws that would be thought arbitrary under normal conditions."

Under the view expressed therein, Act 21 was upheld as valid legislation. See also *Sewer Improvement District No. 1 of Wynne v. Delinquent Lands*, 188 Ark. 738, 68 S.W.2d 80. In the case of *Pouquette v. O'Brien*, 55 Ariz. 248, 100 P.2d 979, the same question was before the court in 1937. In this case, the court refused to grant relief, because it said the emergency no longer existed, and held that the mortgage moratorium acts of 1937 and 1939 were unconstitutional as being in conflict with Section 10, Article I of the Federal Constitution. However, the court, in its language, clearly indicated that the legislation would have been upheld in 1933, and in a rather lengthy opinion, discussed the *Blaisdell* case. Inasmuch as the latter is a very lengthy opinion (consisting, with headnotes, of nearly 51 pages), and the reasoning is summarized quite well in the *Pouquette* case, I quote from the latter in explaining the reasoning of the United States Supreme Court in the former.

"The case is a long one and quotations therefrom sufficient to fully explain and substantiate our conclusions as to its meaning would extend this opinion to unreasonable length. After a careful analysis of the case and its reasoning, we think it clearly laid down the following principles: (a) Legislation of the kind involved in the various mortgage moratorium acts under consideration unquestionably violates section 10, Art. I of the Federal Constitution referred to. (b) There is implied, though not expressed, within the Federal Constitution a reservation of the police power to the states, which is superior to all specific provi-

2. Emphasis supplied.

sions of that constitution and which may be called into play in periods of great public emergency, and when so called these police powers may temporarily only suspend the exercise of the specific powers or prohibitions of the constitution. As was stated in the *Blaisdell* case: "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions * * *." The existence of a public emergency justifying the suspension of the ordinary constitutional limitations is primarily for the legislature, but the determination of that branch of the government is not conclusive, and whether a law depending upon the existence of an emergency ceases to operate because the emergency had ceased is always open to judicial inquiry, notwithstanding the legislative declarations. Again and again through the opinion the court emphasizes the fact in varying language that in order to justify legislation like the mortgage moratorium acts there must exist a grave public emergency in the opinion of both the legislative and judicial branches of the government, and that when, in the opinion of the latter, the emergency which justifies the act has passed, of necessity the moratorium ceases to be effective, or, as it may be more emphatically put, becomes unconstitutional so far as future use is concerned." [55 Ariz. 248, 100 P.2d 981.]

[*Minnesota Act's Validity*]

The Minnesota Act was held valid in an opinion written by one of our greatest jurists, the late Chief Justice Charles Evans Hughes, in which the Court held that the emergency legislation was within the reserved power of the state to protect the vital interests of the community, did not violate the contract clause, the due process clause or the equal protection clause of the Federal Constitution, and the Chief Justice commented that a review of the court's decision showed "a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." [290 U.S. 398, 54 S.Ct. 241.] The opinion cited numerous United States Supreme Court Decisions in support thereof.

It would therefore seem to me that the only question is whether the situation that existed in Little Rock in September, 1958, was sufficiently inimical to the public safety and welfare to justify the legislation here involved. In reaching a conclusion as to this matter, the Court will, of course, take judicial note of the conditions that existed at Central High School during the '57-'58 school year. In commenting upon this situation, I do not primarily refer to the chaotic conditions existing outside the building, *i. e.*, the crowds that had gathered in protest. I mainly have reference to those conditions that existed inside the school, and which were a daily part of student life. Let it first be said, that as far as I know, this is the first time in the history of this nation that troops have patrolled the halls or corridors of a school. I have divers times deliberated as to just how much education a teen-age boy or girl could acquire under such circumstances, and in addition, the frequent threat of bombings, and the systematic search through the lockers and other school property for possible bombs. Conditions could not have been more abnormal, and I am persuaded that the average student could not but be adversely affected by such tense and unusual conditions.

[*Reasons for Governor's Actions*]

With reference to the Governor's proclamation closing the schools, wherein it is stated "Domestic violence within the Little Rock School District is impending * * *," the attorney who filed with this Court a very fine *amicus curiae* brief, stated: "There is no proof whatever in the rec-

ord to sustain this determination." I do not agree. No better criterion could be found than what had already happened. The very fact that the Federal Government deemed it necessary to place troops within the school, speaks louder than a thousand words. I need no better evidence than that the Federal authorities themselves recognized such an emergency as had not heretofore existed, else the troops would not have been sent, or would have been withdrawn once the crowds had melted away. To the contrary, such troops remained for the full school term of nine months, clear through graduation. However, this was not the end. At the time school was due to reopen, the Government sent in from over the country, various United States Marshals, and recruited and trained several dozen Special Deputy Marshals to apparently perform the same duties that had previously been performed by the military. There, of course, was no occasion to recruit this force unless its use was contemplated. As stated in 16 C.J.S. Constitutional Law § 185:

"In the exercise of the police power legislatures may enact all laws necessary for the preservation of the rights of person and property from unlawful violence and disorder and the maintenance of good order throughout the state. *Threatened disorders are equally subject to the police power as are actual disturbances of the public peace.*"³

I cannot even remotely understand, nor comprehend, how any individual could contend that conditions were not such as required the use of the State's police power for the purpose of maintaining peace, good order, and the safety of the students of the senior high schools of Little Rock; in fact, I do not consider it necessary that the situation reach the proportions, or magnitude, herein pointed out, before such legislation would be justified.

[Legislative Leeway]

This Court has previously, even without the conditions herein cited, given the Legislature great leeway in controlling the subject of education. For instance, in *Krause v. Thompson*, 138 Ark. 571, 211 S.W. 925, the validity of a statute was questioned which provided for the con-

solidation of three school districts, and further provided:

"Until such time as the patrons of Pittsburg School District No. 41 and Oakland Special School District No. 19, which are hereby annexed to Lamar Special School District No. 39, shall by a majority petition request their discontinuance, public schools shall be taught in each for a period not exceeding seven months during each year at the places where schools have heretofore been taught and during such seasons as the patrons or a majority thereof may desire, and * * * teachers shall be employed upon the recommendation of a majority of the patrons of each school and shall be paid the same salary as teachers in the public schools of Lamar are paid for like or similar services, * * *."

This Court, in an opinion by the late Chief Justice McCulloch, said:

"The statute is assailed in the first place on the ground that it violates section 1, article 14 of the Constitution which pledges the State to 'maintain a general, suitable and efficient system of free schools, whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction.' If this section applies at all to the arrangement and management of school districts, it certainly does not hamper the Legislature in its control over the subject. We have frequently held that the legislative control over the organization of school districts and changes therein is supreme."

Several cases substantiating this statement are then cited.

It is asserted by counsel in the *amicus curiae* brief, that Act 4 was not emergency legislation, and the fact that an election is called for, which would be determinative of whether the schools should be re-opened, is proof of that fact. May it simply be said that I consider subsection (b) of Section 1 (which calls for the election), to be mere surplusage. It adds nothing to the power given the Governor to close a school, and that authority is fully effective without the provision, or the subsequent provisions relating to the election. The gravamen of the attack on Act 4 is the authority given the Governor to close schools—not those provisions relating to the re-

3. Emphasis supplied.

opening of same.⁴ A discussion, therefore, of the validity of those sections is unnecessary to a determination of the issue before us.

[*More Support Omitted*]

I feel that much could be added in support of the position herein taken, but to say more would only unduly prolong the opinion. This case has given me considerable concern, because of my deep-seated belief in public education. Perhaps that belief is, to some extent, predicated upon, and influenced by, the knowledge that except for our public school system, I should probably have found it most difficult to obtain an adequate elementary or secondary school education. I am convinced that the same is true with reference to thousands of my fellow citizens. It has thus been personally difficult for me to reach this decision, but I always come back to the same thought, viz., that education, under the conditions heretofore enumerated, cannot, even under the most elastic and flexible construction of the words, be considered "suitable" or "efficient" as provided by Article 14, Section 1 of our Constitution. The enthusiasm and energy of youth, which is used to such good advantage for the acquirement of knowledge in happy surroundings, may well be stifled in an environment of fear and restraint.

To sum up and concisely state my views, the Legislature could not, in the face of the provisions of the State Constitution,⁵ enact legislation abolishing the public school system, nor

validly pass legislation closing *permanently* part of the schools.⁶ But, as herein pointed out, the law is well established that constitutional provisions may be suspended during periods of great emergency, and this principle applies to the requirements of both the Federal and State Constitutions. The United States Supreme Court, in the *Blaisdell* case, held that Section 10, Article 1, of the Federal Constitution was violated by the mortgage moratorium act, there under attack, but nonetheless held such legislation valid because of the severe economic depression. In the litigation before us, we are not dealing with an economic crisis—nor with financial losses—but, to the contrary, with an emergency far more important—the health, safety and welfare of hundreds of our young people. Can any court logically say (as has been said by the United States Court and this Court) that a suspension of constitutional requirements is right and proper when economy is affected—but not right and proper when the physical and mental well-being of our citizens is at stake? To ask the question is but to answer it.

[*Time of Emergency Legislation*]

It is impossible to say for what period of time emergency legislation can remain in effect. The Minnesota Act provided that its provisions should become inoperative a little more than two years after it was approved. The Arizona Court held that the emergency was over some four years after the passage of the original act, though it might possibly have held such legislation invalid earlier, had same been tested. I can only say that when conditions become sufficiently normal that student can pursue his quest for learning in surroundings conducive to same—then the need for the extraordinary powers herein granted, will have ceased. Until that time, I am forced to conclude that the pertinent provisions of Act 4 are valid and lawful. I fervently hope that time will soon arrive, and I am convinced that a more sympathetic and realistic approach to the problems (engendered by the Brown decision) by the appropriate Federal authorities, will hasten that day.

4. Even if these portions of the Act be considered invalid, Act 4 contains a severance clause, Section 5, which recites that if any section or provision shall be held unconstitutional, such holding shall not affect the remainder of the Act. The late Justice Frank Smith, in a concurring opinion in the Reiman case, said: "However, Act No. 21 and much similar legislation passed at the same session of the General Assembly manifests the purpose to accord the debtor the greatest indulgence which may be granted, and it is therefore reasonably certain that the legislation would have been enacted even though section 2 were eliminated. It is well settled that the unconstitutional portion of a statute may be stricken out without impairing the effect of the remainder where the provisions are wholly independent and it can be seen that the lawmakers would have enacted the remaining part of the statute * * *." [188 Ark. 983, 68 S.W.2d 472.]

5. Section 1, Article 14: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

6. Of course, many school districts have been consolidated or annexed under legislative authority, where it appeared consolidation would be beneficial. This procedure has been followed for a long number of years, and has been many times declared valid.

Concurring Opinion

ROBINSON, Justice.

I concur for the purpose of setting out in detail the reasons for my conviction that Act No. 4 of the Extraordinary Session of the General Assembly for the State of Arkansas for 1957 violates neither the Constitution of Arkansas nor the Constitution of the United States.

The first question is whether Act No. 4 violates Article 14 of the Constitution of Arkansas of 1874, copied from the Constitution of 1868, providing that the State must maintain free public schools. Does this provision of the Constitution mean that in any and all circumstances free public schools must be maintained? Does this provision of the Constitution mean that the State of Arkansas must maintain integrated schools? We know from the history of the times and particularly of the year 1874, when the present Constitution of Arkansas was adopted, that it was not the intention of the people to compel the State to support integrated schools. The meaning of constitutional guaranties never varies. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303.

[No Integration Before 1874]

No one will deny that prior to 1874 there had been no integration of the races, in schools or otherwise, in the State of Arkansas. As shedding some light on the subject, the Arkansas Constitutional Convention of 1868, although composed to a large extent of people unfriendly to the customs and traditions of the people of this State, went on record as being opposed to any amalgamation of the races. Notwithstanding that those who appear to have been in control of the 1868 Constitutional Convention, as shown by the debates and proceedings of the Convention, were lately from Ohio, Canada, New Jersey, Iowa, Pennsylvania, Indiana, New York, Illinois, Scotland, the District of Columbia, England, and other states, and even though there was warm discussion in the Convention as to whether the Constitution of 1868 should contain a provision prohibiting marriages between the races, there is no indication whatever that any member of the Convention thought there should be integrated public schools.

The Convention, on February 5, 1868, adopted a resolution as follows: "Resolved: That this

Convention is utterly opposed to all amalgamation between the white and colored races, whether the same is legitimate or illegitimate. We would, therefore, recommend that the next General Assembly enact such laws as may effectually govern the same." By amalgamation the resolution has some meaning other than intermarriage between the races, because there was already in force and effect, and had been since February, 1838, a statute which is still in force and effect and which provides: "All marriages of white persons with negroes or mulattoes are declared to be illegal and void." Rev.Stat., Ch. 94, § 4.

[Intermarriage Statute Challenged]

In 1895, in the case of *Dobson v. State*, 61 Ark. 57, 31 S.W. 977, the validity of the intermarriage statute was challenged on the ground that it had been repealed by implication by the Constitutions of 1864, 1868 and 1874 and the Fourteenth Amendment to the Constitution of the United States. The contention of unconstitutionality of the statute was based on the equal rights and privileges of citizenship and that the making of contracts is one of the rights and privileges of a citizen, and that a marriage being in the eyes of the law only a civil contract, the right and privilege of entering into such contract could not be lawfully abridged. In refusing to follow this reasoning, Chief Justice Bunn, writing the opinion of the Court, said: "It is not true that marriage is only a civil contract. It is more than that. It is a social and domestic relation, subject to the exercise of the highest governmental power of the sovereign state,—the police power. . . . Nor does the continued existence of the prohibitory act depend on the rather uncertain foundation that its repeal cannot be asserted because, although in spirit repealed, yet, since this is only by implication, it must stand. The act is on a more solid foundation than that. If repealed in the way contended for, it involves a surrender by the people of one of the attributes of sovereignty. That cannot be attributed to the people, unless made by express declaration, if at all." The validity of the statute prohibiting intermarriages by members of the Negro and White races was upheld.

Maintenance of schools by the State means something more than teaching "the three R's." It forces a social status on the children. The manner of the operation of public schools necessarily

compels social contacts by the students. There are many extracurricular activities involving social contacts that are necessary functions of schools, such as dramatics, where the students are subject to very close social contacts, athletics, school cafeterias, dances, P.T.A. meetings, and other social activities in which the students are more or less compelled to participate.

It has always been the practice in this State to maintain separate schools for White and Negro students, and so far as we have been able to ascertain, this is the first time it has ever been contended in any state court that our Constitution compels the State to maintain integrated schools. This is the first time this Court has been called upon to say whether such construction should be placed on the Constitution. The federal courts, however, have heretofore had occasion to construe our Constitution, Article 14, and Ark.Stat. § 80-509, dealing with public schools. It was held, in *Pitts v. Board of Trustees of De Witt Special School Dist., D.C.*, 84 F.Supp. 975, that our statute, § 80-509, providing for separate schools for White and Colored persons, is not contrary to Article 14 of the Constitution of Arkansas.

[Separate Industrial Schools]

Not only do we have segregated public schools, but we have separate industrial schools for Negro boys and White boys, and a Negro girls' training school, and a like schools for White girls; and other public institutions in the State are segregated, such as the blind schools, the schools for the deaf, the State penitentiary and the State tuberculosis sanitariums.

Long acquiescence of policy pursued in every county in the State, and acts of the Legislature on the subject, are not without compelling force in reaching a conclusion as to the intention of the people when the Constitution was adopted. *Laurel Hill Cemetery v. City and County of San Francisco*, 216 U.S. 358, 30 S.Ct. 301, 54 L.Ed. 515. The Constitution belongs to the people. They can do what they like with it—they can amend it, they can repeal it, and they can construe it. Here the Court has the rare benefit of the constitutional provision under consideration having been construed by the people. The people have a right to say what the Constitution means, and in no uncertain terms, by means of Amendment No. 44, initiated and adopted by the people in 1957, and by the 1957 resolution

adopted by the people, they have clearly shown that no provision of the Constitution of this State means that the State must maintain integrated schools. Amendment No. 44 and the Interposition Resolution of 1957 are set out in full as an appendix to this concurring opinion. Especially pertinent parts of the Amendment and the Resolution are as follows:

Amendment No. 44 provides:

"§ 1. Action by general assembly to protect states' rights.—From and after the Adoption of this Amendment, the General Assembly of the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court,"

"§ 3. Regulation of health, morals, education, marriage and good order.—The General Assembly shall enact such laws under the Police Powers reserved to the States as may be necessary to regulate health, morals, education, marriage, good order and to insure the domestic tranquility of the citizens of the State of Arkansas."

"§ 5. All parts of the Constitution of the State of Arkansas in conflict with this Amendment be, and the same are, hereby repealed."

The Interposition Resolution provides:

"The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas;"

"The legislative, executive and judicial powers of the United States as granted under the Constitution shall not be construed to extend to the regulation of the public schools of any State nor to include a prohibition to any State, in the exercise of its power, to provide by its laws for the establishment, operation and maintenance of racially separate but substantially equal public schools within such State."

Amendment No. 44 is just as much a part of the Constitution as if it had been a part thereof from the first. I don't see how anyone can read

it and the Resolution of Interposition adopted by the people and then say that under the Constitution of Arkansas this State must provide and support integrated schools. In my opinion such construction by the Court would be judicial usurpation of unauthorized power.

[Constitutionality of Act 4]

The next question is whether Act No. 4 violates the Constitution of the United States or the amendments thereto. By its decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and the other cases decided simultaneously therewith, the Supreme Court of the United States did not intend to abolish the police powers of the State. In the *Brown* case and others decided at that time, the Court was dealing with facts in those cases, which were entirely different from the facts presented in the case at bar. The courts may take judicial knowledge of certain things that transpired in connection with the attempt to integrate a Little Rock public school. In *Rice v. Shook*, 27 Ark. 137, this Court said: "The Court will judicially notice that, at the date of the note, Little Rock and a large part of the State were and had been, for some considerable time previously, in possession of the forces of the United States."

An attempt to integrate a school in Little Rock brought about intolerable conditions. When the attempt was made to integrate one school by sending nine Negro students to a White school there was such a violent reaction on the part of the people that it was deemed necessary by the President of the United States to muster into federal service the Arkansas National Guard to reinforce a division of crack first-line United States troops, fully armed, sent to Little Rock to restore and maintain order. The troops were stationed at the schools, in the buildings and on the grounds, and armed soldiers patrolled the streets. The soldiers kept order for months, at a cost to the people of about \$5 million.

[Another Effort in 1958]

At the end of the semester during which the Negro students were kept in the White school, in the spring of 1958, it was thought there would be another effort to integrate the schools in the fall, and in anticipation of the violence that placing the Negro students in the White school would engender, dozens of men were sworn in

as Deputy United States Marshals, and also Deputy United States Marshals from other districts were sent to Little Rock, and all of them were given special training to cope with the violence that it was thought would occur when another effort was made to send Negro students to the White school. Nearly \$400,000 of the people's money was spent in getting the Special United States Marshals ready to handle the anticipated violence. It is not known whether they were to work in connection with the troops or as a separate unit.

In the meantime, the State of Arkansas was taking measures to deal with the situation and prevent bloodshed, and a special session of the Legislature passed Act No. 4, now under consideration. In order to prevent violence that would be brought about by sending the Negro children to White schools, and to prevent the use of armed troops in the school buildings and on the school grounds, the Legislature authorized the Governor to close the school affected. But, undoubtedly, the General Assembly felt that if a majority of the voters, including Negro voters (who constitute a large percentage of the total electors in Little Rock), felt that the schools should be opened, then the schools could be conducted without the use of troops and United States Marshals. Act No. 4 therefore, provides for an election to determine if the people wanted the schools opened. Such an election was held, and the vote was overwhelming in favor of keeping the schools closed.

Now, the question is whether in the existing situation Act No. 4 is valid under the police powers of the State. If the State cannot close schools under conditions we know existed in Little Rock when an attempt was made to integrate a school, then neither can the State close the schools when any other dangerous condition exists, and the police power, one of the few rights left to the States, is gone, perhaps forever.

[Harrison v. Day Inapplicable]

The Virginia case of *Harrison v. Day*, 106 S.E.2d 636, 637, 639, is no precedent for the case at bar. In the Virginia case it is clearly stated: "It will be observed that the stated purpose of the plan embodied in these acts is to prevent the enrollment and instruction of white and colored children in the same public schools." Our Act No. 4 is clearly for the purpose of pre-

venting violence and bloodshed. If there had been no violence and no bloodshed and no use of United States troops in connection with the operation of the Central High School in Little Rock, obviously Act No. 4 would never have been adopted. The assertion that the adoption of Act No. 4 was for the purpose of preventing racial integration of the schools under any circumstances is completely refuted by the fact that the University of Arkansas was integrated a long time before the decision in the Brown case. Such integration was not compelled by any court. There has been integration of other schools, such as the ones at Hoxie, Van Buren, Fayetteville, and perhaps others, but the schools were not closed by the Governor under authority of Act No. 4 because it was not necessary. There was no violence at those places. Act No. 4 grew out of the violence and use of troops and it was adopted to prevent such an occurrence in the future. If the State cannot use its police powers to prevent violence and bloodshed and when conditions are chaotic, thereby making necessary the use of United States troops and the National Guard to restore and maintain order among the people, then the State has no police power.

[Scope of Police Power]

Without attempting to go into a long dissertation on the police power of the States and its scope, I merely quote from what the United States Supreme Court and other authorities have said on the subject: "It has repeatedly been held that no provisions of the Federal Constitution and none of the amendments added to that instrument were intended or designed to interfere with the police power of the various states." 11 Am.Jur. 986. "In accordance with the settled principle that no part of the Federal Constitution was intended to hamper a valid exercise of state police regulation, it is particularly established by overwhelming authority that the Fourteenth Amendment was not designed to interfere with, and does not interfere with, curtail, restrain, destroy, or take from the states the right duly and properly to exercise the police power. Furthermore, this amendment does not limit the subjects upon which the police power of a state may be exerted." 11 Am.Jur. 995-997.

In a letter to Mr. Duff Green, President Lincoln said:

"The maintenance inviolate of the rights

of the states, and especially the right of each state, to order and control its own domestic institutions, according to its own judgment, exclusively, is essential to the balance of powers upon which the perfection and endurance of our political fabric depend."

"It is settled by repeated decisions of this Court that the equal protection clause does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary." *Whitney v. People of State of California*, 274 U.S. 357, 47 S.Ct. 641, 646, 71 L.Ed. 1095. "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. . . . Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to the class of objects which demand the application of the maxim, *salus populi suprema lex* [Let the welfare of the people be the supreme law]; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. [State of] Alabama*, 94 U.S. 645 [24 L.Ed. 302]." *Beer Co. v. Massachusetts*, 97 U.S. 25, 24 L.Ed. 989.

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions,

may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." *Mugler v. State of Kansas*, 123 U.S. 623, 660, 8 S.Ct. 273, 296, 31 L.Ed. 205. In that case the Court further said: "No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S.Ct. 357, 28 L.Ed. 923, that the Fourteenth Amendment had no such effect. After observing, among other things, that that Amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the Amendment—broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed "its police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.'" [Italics ours]

[Many Cases Concur]

Cases without number could be cited to the same effect. But it might appear to be an act of supererogation to cite here the innumerable cases wherein the Supreme Court of the United States has held that the police power of the States was not impaired by the Fourteenth or any other amendment. In *Otis v. Parker*, 187

U.S. 606, 608, 23 S.Ct. 168, 170, 47 L.Ed. 323, Mr. Justice Holmes said: "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus* [always, everywhere and by all]. *Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect.*" [Italics ours.]

No one contends that the people of Arkansas do not have the right to abolish the entire public school system if they so desire. Certainly under its police power the State has the authority to close a school to prevent violence and bloodshed and where, if the school were maintained, the teachers and students would have to take orders from soldiers with fixed bayonets, and Deputy United States Marshals.

APPENDIX

Amendment No. 44

"§ 1. Action by general assembly to protect states' rights.—From and after the adoption of this Amendment, the General Assembly of the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court, including interposing the sovereignty of the State of Arkansas to the end of nullification of these and all deliberate, palpable and dangerous invasions of or encroachments upon rights and powers not delegated to the United States nor prohibited to the States by the Constitution of the United

States and Amendments thereto, and those rights and powers reserved to the States and to the People thereof by any department, commission, officer, or employee of such department or commission of the Government of the United States, or of any Government of any Nation or Federation of Nations acting upon the apparent authority granted them by or assumed by them from the Government of the United States. Said opposition shall continue steadfast until such time as such Un-Constitutional invasions or encroachments shall have been abated or shall have been rectified, or the same shall be transformed into an Amendment to the Constitution of the United States and adopted by action of three-fourths of the States as provided therein.

"§ 2. Statutes for administration and enforcement of amendment—Appropriations.

—The General Assembly shall enact laws to insure the administration and enforcement of the spirit and letter of this Amendment; and shall appropriate adequate funds to effect the same, including a proportionate share of such expenses as may be necessary for the maintenance of regional committees created among the States for the preservation of rights belonging to the states and the people thereof.

"§ 3. Regulation of health, morals, education, marriage and good order.—The General Assembly shall enact such laws under the Police Powers reserved to the States as may be necessary to regulate health, morals, education, marriage, good order and to insure the domestic tranquility of the citizens of the State of Arkansas.

"§ 4. Public officers and employees.—No immunity for violation of laws enacted under amendment—Forfeiture of office for violations.—No public official or employee of the State of Arkansas or of any political subdivision thereof shall have immunity from arrest, prosecution and trial for the violation of such penal laws as the General Assembly shall provide for the wilful failure and refusal to carry out the clear mandates of this Amendment; and in addition to the penalties provided for by the General Assembly, shall automatically forfeit his or her office.

"Repealing Clause. Section 5 of Amendment No. 44, read: 'All parts of the Constitution of the State of Arkansas in conflict with this Amendment be, and the same are, hereby repealed.'"

ARKANSAS RESOLUTION OF INTERPOSITION

"Be It Resolved And Enacted By The People Of The State Of Arkansas:

"The people of the State of Arkansas express their firm resolution to maintain and defend the Constitution of the United States and the Constitution of the State of Arkansas against every attempt, whether foreign or domestic, to weaken or destroy the structure of the State and federal governments.

"The People of Arkansas will ever defend and maintain the fundamental principle of our basic laws by which certain powers were delegated by the people of the separate states to the governments of the separate states while other specifically enumerated powers, not delegated to the separate states or reserved to the people, were delegated to the federal government. The State has never delegated to the Supreme Court of the United States the power to change the Constitution of the United States.

"The People of Arkansas assert that the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political faith depends.

"The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas; and that, by ratification of the Fourteenth Amendment, neither the State of Arkansas nor its people delegated to the federal government, expressly or by implication, the power to regulate or control the operation of the domestic institutions of Arkansas; and any and all decisions of the federal courts or any other department of the federal government to the contrary notwithstanding.

"Therefore, The People of Arkansas, By Popular Vote:

"1. Respectfully appeal to all the people of the United States and to the governments of all the separate states and request them to join the people of Arkansas in taking steps, pursuant to Article V of the Constitution of the United States, by which the Constitution of the United States be amended

so as to contain a provision substantially as follows:

"The legislative, executive and judicial powers of the United States as granted under the Constitution shall not be construed to extend to the regulation of the public schools of any State nor to include a prohibition to any State, in the exercise of its power, to provide by its laws for the establishment, operation and maintenance of racially separate but substantially equal public schools within such State."

"2. Pledge our firm intention to take all appropriate measures, honorably and legally available to us, to resist any and all illegal encroachments upon the powers reserved to the State of Arkansas to order and control its own domestic institutions according to its own exclusive judgment.

"3. Urge upon the separate States and the people thereof their prompt and deliberate efforts to prohibit any further encroachments by the federal government upon the powers reserved to the separate states and the people thereof."

Dissenting Opinion

McFADDIN, Justice (dissenting).

On May 17, 1954, the United States Supreme Court delivered its first decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, which was most unfortunate, and which many believe to be entirely unconstitutional.¹ That decision upset social conditions that had existed in the South from the beginning of the American Union: it decreed racial in-

1. Under our system of separate but equal schools between the white and negro races, as repeatedly recognized by the United States Supreme Court, the Southern Negro has enjoyed educational facilities and opportunities for racial advancement far superior to those enjoyed by members of that race crowded into ghettos in northern cities. If it would accomplish anything constructive, I would write an entire treatise on why *Brown v. Board of Education* is unconstitutional: it is an invasion of the Legislative powers of the Congress, as well as an invasion of the powers reserved to the States in matters of education and local concern. But nothing can be gained, in a decision of the present case, by a further discussion of *Brown v. Board of Education*; because I base my views entirely on the Constitution of the State of Arkansas.

tegration in the public schools. Immediately after that decision, there began in the Southern States—of which Arkansas is proud to be a part—a determined and never-to-be-ended campaign to prevent racial integration in the public schools. One of the measures adopted by the Arkansas Legislature to prevent such racial integration was Act No. 4 of the Second Extraordinary Session of 1958; and that Act (hereinafter called "Act No. 4") is the only legislation now before us on this appeal.

The present suit was filed in the Pulaski Chancery Court by Mrs. Garrett (appellant here) against Orval E. Faubus (appellee here), as Governor of Arkansas, seeking to have Act No. 4 declared unconstitutional as violating Article 14 of the Arkansas Constitution, and also as violative of the Federal Constitution. When a demurrer was sustained and the complaint dismissed, this appeal ensued. The appellant here argues only one point: that Act No. 4 is violative of Article 14 of the State Constitution.² In the *amicus curiae* brief it is urged that Act No. 4 violates not only Article 14 of the Arkansas Constitution, but also Article 2, Section 18 of the Arkansas Constitution, and also the Fourteenth Amendment to the Federal Constitution. Counsel for appellee joins issue with the *amicus curiae* brief on all points; and also urges most strenuously that Act No. 4 is within the police power of the State. I never reach any Federal question. My views are these: (1) the Act No. 4 violates Section 1 of Art. 14 of the Arkansas Constitution; and (2) the claim of "police power" cannot prevent the invalidity of Act No. 4. Now I will elucidate.

I. *Act No. 4.* The Act is captioned: "An Act to provide the Procedure Under Which the Governor May Order to be Closed the Schools of any School District; and For Other Purposes." The Act provides in Section 1 that the Governor may, by Proclamation, order any school, or all

2. The entire argument in the appellant's brief is: "The appellant stands on the plain language of Article 14 of the State Constitution. It is our contention that the plain language of that Article is subject to but one interpretation, and that is that the State shall ever maintain a general, suitable and efficient system of free schools. Hence, any legislation, or official act thereon, closing a school, except for the peace, health and safety of the public, is diametrically opposed to Section 1 of Article 14. The Court will take judicial knowledge of the reason for the closing of the schools involved. The lower court should be reversed with directions to sustain the prayer in the complaint."

schools, of a District to be closed immediately and call a Special Election to be held in the School District within thirty days thereafter, whenever, *inter alia*:

"(b) integration of the races in any school, or all schools, of the school district has been decreed by an order of any court, and pursuant to the enforcement thereof, the President, or other officer of the United States Government, whether of the executive, legislative, or judicial branch, causes troops, whether regular troops, or the federalized National Guard, United States Marshals, or other force at the federal level, to be stationed in, on or about any such public school; or

"(c) he shall determine that a general, suitable, and efficient educational system cannot be maintained in any school district because of the integration of the races in any school within that district."

The Act No. 4 also provides in Section 2: that when a school has been closed by the Governor in accordance with Section 1 of the Act, then there shall be an election—open to all qualified electors of the school district—and the voting shall be for or against racial integration of all of the schools within the school district; that if a majority vote for racial integration, then the schools shall be opened; "• • • otherwise, no school within the district shall be integrated." Section 4 of the Act says: "Any school closed by executive order authorized by this Act shall remain closed until such executive order is countermanded by Proclamation of the Governor filed with the Secretary of State and the Board of Directors of the School District."

Thus it is clear that whether there will be a school in operation in a district depends on: (1) whether the Governor closes the school and calls an election; (2) how the majority votes on the integration issue; and (3) when the Governor issues a Proclamation for reopening of the schools.³ Stated another way, Act No. 4

makes the continued maintenance of the schools in any school district dependent on: (a) attempted integration; (b) Proclamation of the Governor; and (c) vote of the electors in the school district on the issue of integration.

II. *The Arkansas Constitution*. Now, let us see how Act No. 4 measures up to Section 1 of Art. 14 of the Arkansas Constitution, which reads:

"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

Note the words: "• • • the State shall ever maintain a general • • • system of free schools • • •." We have many cases decided by this Court construing and applying this section of the Constitution. Some are: *Maddox v. Neal*, 45 Ark. 121; *Dickinson v. Edmondson*, 120 Ark. 80, 178 S.W. 930, Ann.Cas. 1917C 913; *Krause v. Thompson*, 138 Ark. 571, 211 S.W. 925; *Special School Dist. No. 65 of Logan County v. Banks*, 144 Ark. 34, 221 S.W. 1060; and *Dowell v. School Dist.*, 220 Ark. 828, 250 S.W.2d 127. In *Maddox v. Neal*, supra, Chief Justice Cockrill said: "Without schools there could be no school system, and the directors cannot dispense with the system. • • • It is the clear intention of the Constitution and statutes alike, to place the means of education within the reach of every youth. Education at public expense has thus become a legal right extended by the laws to all the people alike. • • • The opportunity of instruction in the public schools, given by the statute to all the youths of the State, is in obedience, as we have seen, to the special command of the Constitution. • • •"

In *Dickinson v. Edmondson*, supra, Chief Justice McCullouch said: "No one can doubt that those who framed this provision had in mind that schools were to be conducted during each year • • • . The command of the Constitution is to provide by general laws 'for support of common schools,' and that necessarily meant to maintain a system of free schools as complete as can be and continuous in its operations. • • • The establishment of high schools is within the limits of common school education because it merely raises the standard of popular edu-

3. Under Act No. 4 the Governor of Arkansas issued a Proclamation (of which we take judicial notice) on September 12, 1958 closing the public senior high schools of the Little Rock School District; and another Proclamation on September 16th, calling an election for September 27, 1958. At that election the majority vote was against integration; so the four public senior high schools of the Little Rock School District have been closed ever since September, 1958 and an entire school year will soon be completed with no public senior high schools having been maintained in the Little Rock School District.

cation. High schools are 'free schools' within the meaning of the Constitution * * *." [120 Ark. 80, 178 S.W. 932.]

[Role of Taxation]

In *Krause v. Thompson*, supra, Chief Justice McCullouch said: "School facilities must, of course, be afforded where taxation for maintenance of the schools is imposed * * *." [138 Ark. 571, 211 S.W. 926.] In *Special School Dist. No. 65 of Logan County v. Banks*, supra, the Legislature had passed a law permitting a Special School District in Logan County to charge tuition; and the Act was held unconstitutional by this Court as being in conflict with Art. 14 § 1 of the Constitution which guarantees that instruction be "gratuitous." Mr. Justice Hart said:

"As we have already seen, under the plain mandate of our Constitution above quoted and referred to, the gratuitous instruction of all persons in the school district between the ages of six and 21 years is guaranteed in the public schools. The terms 'public schools' or 'common schools' are used in our Constitution to denote that such schools are open to all persons within the approved ages rather than to indicate the grade of a school, or what may or may not be taught therein." [144 Ark. 34, 221 S.W. 1060.]

A further review of opinions involving Section 1 of Art. 14 of the Arkansas Constitution is unnecessary. The rationale of our holdings is that the constitutional language means what it says, and that the State * * * shall ever maintain a general * * * system of free schools whereby all persons * * * between the ages of six and twenty-one * * * may receive * * * instruction. * * * That is the constitutional mandate that the People of Arkansas gave to the Legislature and the officials of this State. "To maintain" a high school means to keep it open and operating;⁴ that is what the Constitution says; and tax money is being collected in every school district in Arkansas to maintain the schools. "It is not the form, but the operation and effect, which determines the constitution-

4. Webster's Unabridged Dictionary says that "maintain" means, *inter alia*, " * * * to hold or keep in any particular state or condition * * * to support * * * not to suffer to fail or decline * * * to bear the expense of * * * to carry on * * * to give support to * * *."

ality of a statute." *Webb v. Adams*, 180 Ark. 713, 23 S.W.2d 617, 621.

As heretofore shown, Act No. 4 allows the schools to be closed indefinitely as long as the threat of racial integration exists, and allows a vote to be taken—on a local option basis—to determine when and under what conditions the schools shall be reopened. Art. 14 of the Arkansas Constitution gives no such power to the Governor, or any other person, to close the schools. Neither does the Constitution provide for local option to defeat the schools. So I maintain that Act No. 4 violates Section 1 of Art. 14 of the Arkansas Constitution. I can see it no other way.

["Separate But Equal" Invalidated]

But it has been said that when we adopted our Constitution in 1874, the rule of "separate but equal" governed in school matters, and that when the United States Supreme Court revolutionized that rule by the decision of *Brown v. Board of Education* in 1954, then the State of Arkansas had a right to change its policy on public education. It is true that the State has a right to change its policy on public education: but the point is, that Art. 14 of our Constitution has *not* been repealed by vote of the people of Arkansas,⁵ and until Art. 14 of the Constitution is repealed, this Court must continue to test legislation by the Constitution as it is, and not by what we think it may be in the future. Two wrongs will never make a right: just because the Supreme Court of the United States went contrary to the Federal Constitution in *Brown v. Board of Education*, is no reason or excuse why this State Court should go contrary to our State Constitution. Until the people of Arkansas repeal Art. 14 of our Constitution, this Court should obey Art. 14, which guarantees that the State shall maintain free schools. Act No. 4 violates that consti-

5. Amendment No. 44 to the Arkansas Constitution was not mentioned in any of the briefs. That Amendment certainly does not expressly repeal Section 1, Art. 14 of the Arkansas Constitution. Neither does Amendment No. 44 impliedly repeal said Section 1 of Art. 14, because implied repeals are not favored, either in constitutional or statutory construction (16 C.J.S. Constitutional Law § 7, p. 35 and § 42, p. 131). One might just as well argue that the Amendment No. 44 impliedly repeals Art. 2 of the Arkansas Constitution (the declaration of rights) as to argue that it impliedly repeals Art. 14 of the Arkansas Constitution, which guarantees the maintenance of free schools.

tutional guaranty. If the People of Arkansas want to strike Art. 14 from the Constitution, then the schools may be closed under some legislation similar to Act No. 4. But until Art. 14 of the Constitution is repealed, then it is my solemn and sincere view that Act No. 4 is violative of the Arkansas Constitution.

III. Police Power. These words are used to express various legal concepts, and a distinction of use is necessary. In this case, the words, "police power", have at least three different concepts:

- (1) The power reserved to the States, as contrasted to the Federal power;
- (2) The inherent power of the State Legislative department; and
- (3) The emergency powers of the Legislative or Executive Department.

In the present case I am not concerned with the first application (i. e. State v. Federal) because I never reach any Federal question; and all the cases about "reserved powers of the State" are entirely beside the mark, as I see the case. Act No. 4 violates the State Constitution; and so I never reach any Federal question. I will, however, discuss concepts 2 and 3 (*supra*) to show that Act No. 4 cannot be upheld on the basis of police power.

[Police Power Limited]

The rule is recognized everywhere that the police power of the State Legislature is limited by the State Constitution. In 16 C.J.S. Constitutional Law § 196, p. 949, cases from over a score of jurisdictions are cited to sustain this statement: "*Limited by state constitution*. However broad the scope of the police power, it is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state constitution, nor may constitutional guaranties and limitations be set aside by an application of such power, because of changed economic, sociological, or political conditions." In *Gaines & Co. v. Holmes*, 154 Ga. 344, 114 S.E. 327, 331, 27 A.L.R. 98, the Supreme Court of Georgia quoted this language: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety . . . is a palpable invasion of rights secured by

the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." In *People v. Chicago, M. & St. P. R. Co.*, 306 Ill. 486, 138 N.E. 155, 158, 28 A.L.R. 610, the Supreme Court of Illinois quoted this language: " . . . no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process and equal protection of the laws, and should not 'override the demands of natural justice.'" In *Goldman v. Crowther*, 147 Md. 282, 128 A. 50, 54, 38 A.L.R. 1455, the Maryland Court of Appeals quoted this language regarding the police power: "But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution." In *Cooley on "Constitutional Limitations"* 8th Ed. p. 1229, in speaking of the police power, this appears: "But the power is subject to the limitations imposed by the . . . State Constitutions upon every power of government, and it will not be suffered to invade or impair the fundamental liberties of the citizens."

In short, the Arkansas Legislature cannot, under the guise of police power, enact legislation contrary to the Arkansas Constitution. To hold otherwise would make the Constitution of no protection. So, in the case at bar: the guaranty contained in Section 1 of Art. 14 of the Arkansas Constitution is for the *maintenance* of schools; and this guaranty cannot be nullified by the legislature under the guise of the police power, because such power does not extend to legislation violating our own Constitution.

[Limited by Emergency]

I come then to concept 3 of the police power (i. e. the emergency power). There is a line of cases which says that statutes may be enacted by the Legislature, or Proclamation made by the Governor, to cope with unusual emergencies and exigencies. This is discussed in 11 Am.Jur. 979, "Constitutional Law" § 252, "Emergency Police Legislation." But the cases on such emergency police legislation recognize that a law dependent upon the existence of an emergency can only apply to an *emergency situation*; and that such a law ceases to operate when the emergency is past; and that it is the duty of the Courts to decide as to the existence and the end of the emergency.

Of course, in time of plague, pestilence, or other great danger, schools can be closed as

health measures or police measures; but this is only for the emergency. In the case at bar, the closing is permanent—not merely until some plague or pestilence or danger has subsided, but—the schools will be closed as long as there is a threat of racial integration in the schools. That is too long. An entire generation could grow up—and probably will—while we are striving to get a Supreme Court of the United States that will overrule *Brown v. Board of Education* and return to the constitutional doctrine of “separate but equal.” Meantime, are the schools to remain closed? They have already been closed for nearly a whole school year. Under Act No. 4 they could be closed for an entire generation. Thus it is clear that Act No. 4 cannot be sustained under any theory of “Emergency Police Powers,” because we are not dealing with the kind of an emergency that permits the use of “Emergency Police Powers.” Rather, we are dealing with a condition that has already existed since 1954 and

will continue to exist until either the United States Constitution is amended or the United States Supreme Court overrules *Brown v. Board of Education*.

[Two Wrongs Not a Right]

Two wrongs do not make a right. Let the Supreme Court of Arkansas stay within the Arkansas Constitution, even if the United States Supreme Court has not stayed within the Federal Constitution. Section 1 of Art. 14 of the Arkansas Constitution says: “* * * the State * * * shall ever maintain a general * * * system of free schools * * *.” The State is not “maintaining,” and never will “maintain” such a system under Act No. 4; and so I sincerely and solemnly say that Act No. 4 violates Section 1 of Art. 14 of the Arkansas Constitution and should be stricken.

EDUCATION

Public Schools—Delaware

Brenda EVANS et al. v. Madeline BUCHANAN et al.

United States District Court, District of Delaware, June 15, 1959, 173 F.Supp. 891.

SUMMARY: Class actions in federal district court in Delaware resulted in a judgment directing defendant state and local school officials to present plans for integration and to admit plaintiff Negro school children to specific named schools on a non-discriminatory basis. See 145 F.Supp. 873, 2 Race Rel. L. Rep. 7 (1956); 149 F.Supp. 376, 2 Race Rel. L. Rep. 301 (1957); 2 Race Rel. L. Rep. 781 (1957), *affirmed*, 256 F.2d 688, 3 Race Rel. L. Rep. 901 (3d Cir. 1958). The State Board of Education then submitted a plan providing for grade-by-grade desegregation over a twelve-year period, beginning with all first grades at the fall term, 1959. The plan was approved, except for a paragraph reading, “Whenever possible, every pupil in the grades affected . . . shall have the choice of (a) attending the nearest school within the district where he resides or (b) attending the school he would have attended prior to the effective date of this order,” which the court ordered eliminated as discriminatory. 172 F.Supp. 508, 4 Race Rel. L. Rep. 257 (1959). Defendants petitioned the court to restore this paragraph, or in the alternative, that the plan contain a provision permitting each local board to establish attendance areas. The alternative was rejected as “unacceptable” both from a practical and a legal standpoint. The court refused to restore the paragraph ordered eliminated, because as applied to many localities where Negroes live nearer a colored school than to a white school, it would result in no colored student being

able ever to attend a white school unless his parents changed their residence; on the other hand, the paragraph discriminatorily allows a white student to attend a white school even though he lives closer to a colored school. The court also ruled that the plan need not contain a provision for uniform attendance areas throughout the state, because the State Board already had power to establish attendance areas, and all students would be compelled to abide by the Board's rules if they were non-discriminatory in character and fairly administered.

LAYTON, District Judge.

On April 24, 1959, this Court approved a plan providing for the desegregation of the Delaware Public School system on a grade by grade basis over a period of twelve years beginning with all first grades at the Fall Term, 1959. Paragraph 4 of the Plan was disapproved and ordered eliminated because it was thought to be discriminatory. This paragraph read as follows:

"Whenever possible, every pupil in the grades affected, beginning with the start of the fall term, 1959, and in additional grades as the program expands in succeeding years shall have the choice of (a) attending the nearest school within the district in which he resides or (b) attending the school he would have attended prior to the effective date of this order."

In ordering the paragraph stricken, the Court stated [172 F.Supp. 516]:

"Now, it is a fact that in Georgetown, for example, the majority of the Negroes live in a community known as The Hill. The colored school is close by. The white school is at a much greater distance. Interpreting the language of paragraph 4 in the light of these facts, it would seem to result that no Negro student whose family resides on The Hill may ever enter the white school. Whatever may have been the reasons for this provision, it strikes me as unfair and is ordered to be stricken."

[Restoration of Deleted Clause Asked]

The petition now before this Court seeks the restoration of paragraph 4 to the Plan or, in the alternative, that the Plan contain a provision permitting each local board to establish attendance areas. Insofar as concerns this latter alternative, it is sufficient to say that not only from a practical, but also from a legal, standpoint it is unacceptable.

As to the restoration of the former paragraph 4 to the Plan, the petitioners say, first, that it is

not discriminatory, citing *School Board of City of Charlottesville, Va. v. Allen*, 4 Cir., 240 F.2d 59, 64 and, secondly, that it is necessary that any over-all plan contain a provision establishing uniform attendance areas.

It is not clear just how the *Allen* case, above cited, establishes that a provision such as paragraph 4 is not discriminatory. All the Fourth Circuit Court of Appeals said in that decision was that " * * * local rules as to assignment to classes, so long as such rules are not based on race or color, are to be observed * * *." Had paragraph 4 stated merely that Negro students must abide by the regulations of the State School Board as to attendance areas provided such areas were not established in such fashion as to discriminate against the colored race, there could have been no possible objection. But the paragraph said no such thing. Read against a background of geographical facts of which judicial knowledge may be taken, it provided that in many localities no colored student could ever attend a white school unless his parents thereafter changed their residence to a point closer to the white school than the colored school. Moreover, the paragraph was discriminatory because a white student who lived closer to the colored school than the white school could, nevertheless, thereafter attend the white school.

[Uniform Attendance Areas Unnecessary]

Nor, contrary to the argument of the petitioners, is it essential that the Plan contain a provision providing for uniform attendance areas throughout the State. The State Board of Education has the clear power to establish attendance areas by regulation and all Negro students must abide by any such regulation provided it is non-discriminatory in character and fairly administered.

In conclusion, it may be said that many problems will arise from time to time as the result of integrating the Public School System which can only be solved by patience, wisdom and tolerance. The question of the establishment of uniform attendance areas may constitute a major

problem¹ in the future, although, contrary to the contentions of the State Board, no such problem¹ presently exists. The Court is not disposed to see the State educational system disrupted by a sudden, unlimited influx into the white schools of vast numbers of colored students which will lead to serious overcrowding and place a severe strain on school facilities. Nor, conversely, will it permit the school authorities to confine inte-

gration to a bare token under the guise of regulations such as paragraph 4. More than five years have now expired since the Supreme Court of the United States declared racial segregation in the public schools unconstitutional. It is time now to get down to the serious business of integration. Surely, it is within the wisdom and ingenuity of the members of the State Board to devise a regulation dealing with attendance areas which will prevent an immediate and unwarranted overcrowding of the facilities of the white schools and at the same time, upon the showing of good cause, permit a limited number of Negro students to transfer to a white school.

The prayers of the petition are denied. Order upon notice.

1. At the time of the filing of the petition for this rehearing there was newspaper publicity quoting the State Superintendent of Public Schools as saying that unless paragraph 4, or equivalent language, were restored to the Plan, "chaos" would result. As a matter of actual fact, for the school year 1959-1960, but 25 Negro children in the entire State (exclusive of Wilmington) have made application to transfer to a white school.

EDUCATION

Public Schools—Georgia

Vivian CALHOUN et al. v. MEMBERS OF BOARD OF EDUCATION, CITY OF ATLANTA et al.

United States District Court, Northern District, Georgia, Atlanta Division, June 16, 1959, Civil Action No. 6298.

SUMMARY: Several Atlanta, Georgia, Negro children sought in federal district court to have local public school officials enjoined from operating schools on a racially segregated basis and from refusing because of race and color to permit plaintiffs to attend any local public school which they were otherwise qualified to attend. A motion by defendants to dismiss was denied in May, 1958. On June 5, 1959, in a preliminary order prior to trial, the court took judicial notice of segregated operation of Atlanta public schools, stating that such operation violates the Fourteenth Amendment but that this tentative ruling did not mean that immediate integration would be ordered. Defendants objected to the assumption that they had pursued a policy of racial discrimination and contended that separation of the races in Atlanta schools arose through the choice of Negroes themselves. Subsequent to the trial, the court on June 16 entered its findings of fact and conclusions of law that racial segregation did exist in the operation of Atlanta public schools contrary to the Fourteenth Amendment as interpreted in the *School Segregation Cases*. Defendants were enjoined from further so operating the schools and ordered to submit, by December 1, 1959, a complete plan for a prompt and reasonable start toward desegregation and a systematic, effective method for achieving desegregation with all deliberate speed. The court assumed that such plan would "contemplate a gradual process, which would contemplate a careful screening of each applicant to determine his or her fitness to enter the school to which application is made." The phrase "deliberate speed" was interpreted to mean "such speed as is consistent with the welfare of all our people, with the maintenance of law and order, and with the preservation if possible of our common school system." It was noted that under Georgia laws integration would result in state money for Atlanta schools being cut off, with the possible effect of closing them.

Therefore, the court stated that the plan required might be submitted to it subject to approval by the Georgia legislature, and, if the plan were approved by the court as reasonable, the legislature would be allowed sufficient time to act upon it. The preliminary order, findings of fact and conclusions of law, and order follow.

HOOPER, District Judge.

ORDER OF COURT

In this action a number of negro children of Atlanta seek to obtain an injunction against defendants who are in charge of the operation of the Atlanta Public School System "from operating the Public School System of Atlanta on a racially segregated basis and enjoining the defendants from refusing to permit the minor plaintiffs to attend any public school in the City of Atlanta which they are otherwise qualified to attend solely because of their race and color." The plaintiffs do not allege that they have made application for admission to any particular school in Atlanta and have been denied admission solely on account of their race. They do contend, however, that defendants "are presently operating the Public School System of Atlanta on a racially segregated basis pursuant to policy, usage, regulations and laws of the State of Georgia enforcing racial segregation in public institutions (Para. 9)." It is alleged that the next friends of these minor plaintiffs being their parents, have filed between the dates of June, 1955 through September, 1956 written petitions with defendants to reorganize such public schools on a racially non-segregated basis in compliance with the decision of the United States Supreme Court in the case of *Brown v. Board of Education of Topeka*, but defendants have failed and refused to do so.

[Statement to Clarify Issues]

Defendants have filed a motion to dismiss this case which the Court denied on May 15, 1958. In order to expedite the trial of the case this Court, contrary to its usual custom, has set it down for a final trial without the benefit of a pretrial, and this statement is made by the Court prior to the trial in order to clarify the issues as they appear to the Court.

1. This Court does not need to hear witnesses upon the question as to whether the Atlanta Public Schools are now operated on a racially segregated basis, and for some years prior hereto have been so operated. It is a matter of common knowledge that for many years separate

schools have been maintained throughout the City of Atlanta for both the white and the colored children, pursuant to the law as declared by the United States Supreme Court prior to the decision in the *Brown* case in 1954.

However, this Court is bound by the decision of the United States Supreme Court as announced not only in the *Brown* case, but in many other cases subsequent to the *Brown* case, arising in Little Rock, Arkansas, in Virginia, and in other localities. Even the most ardent segregationists in the land, though bitterly opposed to such ruling, now recognize that racially segregated public schools are not permitted by law. Even the Legislature of Georgia and of other states recognize that the ruling of the United States Supreme Court constitutes the law on this question, and the various legislatures for some years have been passing laws in order to meet the problems created by such decisions. The validity of such laws is not now before this Court for a decision. This Court can not at this time make any other ruling except a ruling to the effect that the operation of racially segregated public schools in Atlanta violates the Fourteenth Amendment to the United States Constitution. To make any other ruling would only add to the confusion which already exists in the minds of so many of our good citizens, and to build up in the breasts of our citizens hopes of escape which would soon be torn into shreds by rulings of our appellate courts on review. This Court feels that any such ruling could accomplish no good, but only cause irreparable harm to our state and her people.

2. Neither would it serve any good purpose for this Court to hear testimony of a large number of witnesses in person or by depositions upon the question as to whether or not racial discrimination has been practiced and is now being practiced in the operation of the Atlanta Public Schools. The defendants herein, together with all school officials in the State of Georgia, have been attempting to operate Georgia's public schools on the basis of affording to the negro population equal but separate facilities, which was permissible under decisions of the United

States Supreme Court for many years but not permissible since 1954 under decision in the Brown case. If the defendants do not intend in the future to operate the schools on a racially segregated basis, defendants may so inform the Court at this time.

3. The factual situation in this case and the prayers for relief are practically identical with those arising in the case of Orleans Parish School Board v. Bush, 242 F.2d 156, the United States District Court sitting in New Orleans, Louisiana. In that case the trial Judge entered a decree reciting that the schools in question were being operated on a racially segregated basis and enjoining the school authorities "from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by decision of the Supreme Court in the case of Brown v. Board of Education of Topeka." (See p. 162)

While the prayers of the plaintiffs in the case just cited were to the effect that segregation be ended at once the Court did not so order, but allowed to the defendants sufficient time to make arrangements for admission of children on a racially non-discriminatory basis.

[Immediate Integration Not Contemplated]

The tentative ruling here made does not mean that this Court in this case will order immediate integration of the Atlanta Public Schools, to the end that Atlanta's Public Schools must be integrated or else closed by September, 1959.

This Court does not desire or intend to foreclose either the parties plaintiff or the parties defendant in this case from offering evidence upon any of the issues involved which are material and are in dispute. Counsel for the plaintiffs may state for the record any additional facts which they wish to show and counsel for the defendants may do likewise, and the Court will then rule upon the admissibility of such evidence. Where the contents of depositions however are admitted, counsel offering the depositions are instructed to state to the Court merely the contents of the same and the Court will if necessary read the depositions in their entirety.

I have conferred with Judge Sloan, who sits with me here only in an advisory capacity, and

am authorized to state that he fully agrees with the statements made and concurs in what is here ruled.

With the foregoing as a basis for trial of the case counsel may now proceed.

This the 5th day of June, 1959.

FRANK A. HOOPER
UNITED STATES DISTRICT
JUDGE

STATEMENT OF THE CASE

In this action a number of negro children of Atlanta seek to obtain an injunction against defendants who are in charge of the operation of the Atlanta Public School System "from operating the Public School System of Atlanta on a racially segregated basis and enjoining the defendants from refusing to permit the minor plaintiffs to attend any public school in the City of Atlanta which they are otherwise qualified to attend solely because of their race and color." The plaintiffs do not allege that they have made application for admission to any particular school in Atlanta and have been denied admission solely on account of their race. They do contend, however, that defendants "are presently operating the Public School System of Atlanta on a racially segregated basis pursuant to policy, usage, regulations and laws of the State of Georgia enforcing racial segregation in public institutions (Para. 9)." It is alleged that the next friends of these minor plaintiffs being their parents, have filed between the dates of June, 1955 through September, 1956 written petitions with defendants to reorganize such public schools on a racially non-segregated basis in compliance with the decision of the United States Supreme Court in the case of Brown v. Board of Education, 347 U.S., 483, but defendants have failed and refused to do so.

[Preliminary Order Discussed]

Just prior to the trial of the case this Court entered an Order to the effect that the Court would take judicial cognizance of the fact that the Public Schools of Atlanta had been operated, and were being operated, on a racially segregated basis. This assumption by the Court was based upon certain acts of the Georgia Legislature preventing the mixing of the races in the schools, the political campaigns of many officials pledging the continuance of segregation, public

meetings held in the City of Atlanta debating the question as to whether, should the Court enjoin segregation, the Atlanta Public Schools should be closed and private schools organized, or whether on the other hand, there should be so-called "token integration" similar to that as contemplated by a recent Act of the Legislature of the State of Alabama, which has had the approval of the United States Supreme Court.

Counsel for defendants, however, made vigorous objection to this assumption upon the part of the Court and expressed a desire to produce evidence to show that defendants had not pursued a policy of racial discrimination in violation of the principles set down by the United States Supreme Court, by the Fifth Circuit Court of Appeals, and by many other appellate courts in the land. As the burden of proof on that issue rested with the plaintiffs the Court heard evidence on the same from several witnesses, but did not find it necessary to hear from some forty-one witnesses in the court room which were sworn by the parties. Witnesses on the same issue, which would have been cumulative, were not heard. The trial consumed one usual court day, extending from 9:30 A.M. to 4:30 P.M., at the conclusion of which the Court announced its ruling but, on account of the pressure of other trials, has not been able until now to prepare Findings of Fact, Conclusions of Law and a Final Decree.

THE FACTS IN THE CASE

The testimony was undisputed to the effect that plaintiffs are negro children of the City of Atlanta, attending its public schools, and that such schools are under the control and supervision of defendants. It is undisputed that defendants now, and ever since the establishment of the Atlanta School System, have been providing separate schools for white and negro children, although defendants through their counsel contended that such separation arose through the choice of the negroes themselves. The sole issue of fact therefore, was whether or not racial discrimination existed in the custom and practice of the operation of the Atlanta Public Schools. The Court finds that the undisputed evidence in the case demands that this question be answered in the affirmative.

Plaintiffs put upon the witness stand one of the defendants, Dr. Rufus E. Clement, a negro who had been elected and re-elected by the

citizens of Atlanta to the Board of Education. He testified positively that racial discrimination did exist. Miss Ira Jarrell, for some years Superintendent of the Atlanta Public Schools, she being a defendant who was sworn as an adverse witness, testified as to the manner in which school children, negro and white, were allocated to the various schools. While she did not testify that definite areas surrounding each of the schools were designated for either white or colored, she stated that for the most part that children did attend the schools nearer to their residences, but that requests by students and their parents to be allowed to attend other schools were usually granted.

Plaintiffs put in evidence excerpts from the Minutes of many meetings of the Board of Education from which it appeared that certain schools of the city were designated as "colored", others as "white." Thus, the Minutes of April 11, 1955 showed a recommendation for the election of a certain person as a teacher under the classification "colored, elementary", and two others under the classification "colored". Similar references are made in the Minutes of some ten other subsequent meetings, extending almost to the date of the trial. There was also undisputed evidence to the effect that in connection with the issuance of bonds for the building of new schools through many years, designation was made of such schools as "negro" or "white".

If, however, there exists any room for doubt as to racial discrimination prior to 1955, it would be dispelled by the circumstance that during that year and for some years subsequent thereto, the plaintiffs in this case have filed written petitions with defendants seeking the ending of racial discrimination. They were not advised that racial discrimination did not exist, but on the other hand were informed that the matter would be taken under consideration and studied. There the matter has rested for some four years.

NATURE OF THE DECREE TO BE RENDERED

At the opening of this trial the Court announced that relief would be awarded petitioners similar to that granted by the United States District Court for the Eastern District of Louisiana, which was approved on appeal by the Fifth Circuit Court of Appeals, in the case of Orleans Parish School Board vs. Bush, 242 F.2d, 156, decided April 5, 1957. In that case approval was given to a judgment of the trial court which en-

joined the school authorities "from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis, with all deliberate speed as required by the decision of the Supreme Court in *Brown vs. Board of Education of Topeka*, 349 U.S., 294." In that case, as in this one, it appeared that the plaintiffs "as negro students, were seeking an end to a local school board rule that required segregation of all negro students from all white students." They "were not seeking specific assignment to particular schools." The Court stated:

"As patrons of the Orleans Parish School System they are undoubtedly entitled to have the District Court pass on their right to seek relief."

Even the most ardent segregationists have now acknowledged that the *Brown* decision is the law of the land. Legislatures in many states, including Georgia, have, since the rendition of that decision, been passing legislation seeking to avoid its consequences. For this Court to declare as law that which is not law would be not only a futile gesture, but a great dis-service to our people. It would add to the confusion already existing in the public mind, it would build up hopes destined to be destroyed on appeal, and it would delay the efforts now being made by our people to find the best solution possible to a critical and urgent problem.

[Desegregation Plan Ordered]

This Court is under no duty, nor does it have the power, to order integration, but it is compelled to enjoin racial discrimination. It is not the function of the Court to suggest to defendants how such discrimination can best be eliminated, but the plan must originate with the defendants and be submitted to the Court for approval. Nothing said by the Court during the trial of this case was intended to be an expression of opinion by the Court as to the plan, but the Court did assume, and now assumes, that any plan submitted would contemplate a gradual process, which would contemplate a careful screening of each applicant to determine his or her fitness to enter the school to which application is made. The Supreme Court has said that school authorities must proceed with "deliberate

speed" toward the elimination of racial discrimination, and this Court interprets the expression "deliberate speed" to mean such speed as is consistent with the welfare of all our people, with the maintenance of law and order, and with the preservation if possible of our common school system. The custom and practice of maintaining separate schools for negroes and whites has existed in this state for many years, with the approval of the highest courts of the land, and it can not rapidly and suddenly be ended.

It will be necessary for defendants within a reasonable time to signify to this Court the manner in which defendants propose to eliminate racial discrimination.

This Court fully recognizes the difficult position in which defendants herein are placed. If they integrate the schools, all State money under existing laws will be cut off and it may be that such funds are necessary for the operation. The continued operation, however, with discrimination as in the past, will not be permitted.

[Legislature to Consider Plan]

In cases such as this a solution must be found to fit the particular conditions which exist. This Court feels that it should give defendants a reasonable opportunity to submit to the Court a plan whereby racial discrimination will be discontinued. However, such a plan may be submitted subject to approval thereof by the Georgia Legislature, and the Court would allow sufficient time for the Georgia Legislature to act upon the same. If defendants submit a reasonable plan, and it should be approved by the Court, defendants would have done all that they are able to do under the circumstances. Failure of defendants, however, within a reasonable time to submit any plan whatsoever shall be construed by the Court to be a refusal to do so. The Court will do everything in its power toward working out any possible solution to this matter within the framework of the law, as declared upon repeated occasions by our appellate courts. Counsel for plaintiffs shall submit to this Court a decree in conformity herewith, serving defense counsel, who shall within ten days of such service notify this Court of any objections thereto.

This the 16th day of June, 1959.

FRANK A. HOOPER
UNITED STATES DISTRICT
JUDGE

ORDER OF COURT

This cause having come on for trial on the 5th day of June, 1959 and the Court having made and filed on the 16th day of June, 1959 its Opinion, Findings of Fact and Conclusions of Law, and based upon such Opinion, Findings of Fact and Conclusions of Law, it is now ORDERED:

1. That the defendants and each of them, their agents, employees, successors in office, and all persons in active concert and participation with them be, and they hereby are, enjoined from enforcing and pursuing the policy, practice, custom, and usage of requiring or permitting racial segregation in the operation of the public schools of the City of Atlanta, and from engaging in any and all action which limits or affects admission to, attendance in, or education of, infant plaintiffs, or any other Negro children similarly situated, in schools under defendant's jurisdiction, on the basis of race or color:

Provided That, defendants will be allowed a reasonable period of time to achieve full compliance with this Order and for bringing about a transition to a school system not operated on the basis of race;

Provided Further That, defendants are herewith directed to present to this Court, on or before the first day of December, 1959 a complete plan, adopted by them, which is designed to

bring about compliance with this Order, and which shall provide for a prompt and reasonable start toward desegregation of the public schools of the City of Atlanta and a systematic and effective method for achieving such desegregation with all deliberate speed. Such plan may be submitted contingent upon the enactment of statutes permitting such plan to be put into operation.

2. That following the filing of defendants' plan with this Court, a further hearing will be held in this cause, at which time the defendants may offer such evidence and arguments as they may desire in support of said plan and the plaintiffs may offer such evidence and arguments with respect to the plan as they may be advised to present.

3. This Judgment of the Court is not a final Judgment in the case and the Court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree and during such time as may be necessary to put into effect the defendants' plan.

This the 9th day of July, 1959.

FRANK A. HOOPER
UNITED STATES DISTRICT
JUDGE.

EDUCATION

Public Schools—Louisiana

ORLEANS PARISH SCHOOL BOARD v. Earl Benjamin BUSH et al.

United States Court of Appeals, Fifth Circuit, June 9, 1959, 268 F.2d 78; United States District Court, Eastern District, Louisiana, July 15, 1959, No. 3630 C.A.

SUMMARY: Negro children brought a class action in federal district court seeking injunctive and declaratory relief as to their right to be admitted to Orleans Parish, Louisiana, public schools without regard to race. State school segregation laws were declared unconstitutional, and a preliminary injunction was issued requiring desegregation. 138 F.Supp. 336 and 337; 1 Race Rel. L. Rep. 305 and 306 (1956). For other developments in this case see 1 Race Rel. L. Rep. 643 (1956); 2 Race Rel. L. Rep. 308 and 778 (1957); 3 Race Rel. L. Rep. 171 and 424 (1958). Subsequently, the board moved to vacate the preliminary injunction and to dismiss the case on the ground that it was not a proper party defendant, because of a 1956 statute [1 Race Rel. L. Rep. 927 (1956)] transferring the board's control of classifications to a

state agency. The motion was denied, the court declaring the statute to be a legal artifice contrived to circumvent the ruling of the School Segregation Cases and, therefore, unconstitutional on its face. 163 F.Supp. 701, 3 Race Rel. L. Rep. 649 (E.D. La. 1958). The injunction against the Board was thereupon made permanent. On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment, holding the constitutionality of the 1956 statute to be immaterial because it had left the operation of the parish schools with the parish board, which therefore was properly subject to the injunction restraining it from segregated operation. On petition for rehearing, the board argued that the principle of federal court abstention from ruling on the constitutionality of state laws until they are interpreted by state courts called for a remand of this case to the district court for a stay of proceeding. The petition was denied on the ground that it was unnecessary here to construe state laws, it being beyond the power of any state law to make permissible the segregated operation of public schools by defendant. Emphasis was also placed on the fact that federal jurisdiction was based on a federal question and not on diversity of citizenship. Subsequently, the district court ordered the school board to present a plan by March 1, 1960. This was subsequently changed to May 16, 1960. The court of appeals opinion and the district court orders follow:

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

PER CURIAM.

This is the third appearance of this case here. On February 15, 1956, the District Court entered a preliminary injunction ordering "that the defendant, Orleans Parish School Board, a corporation, and its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in *Brown v. Board of Education of Topeka*, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083]."

This order was appealed to this court and was here affirmed, 5 Cir., 242 F.2d 156. The Supreme Court denied certiorari, 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed.2d 1436. Subsequently a motion to vacate this preliminary injunction on a technical ground was denied by the trial court and on appeal this order was also affirmed, 5 Cir., 252 F.2d 253. The Supreme Court again denied certiorari, 356 U.S. 969, 78 S.Ct. 1008, 2 L.Ed.2d 1074.

On April 16, 1958, asserting that on July 13, 1956, long before it filed its previous motion to dismiss the injunction, the Legislature passed and the Governor of Louisiana approved Act 319 of the Acts of 1956, LSA-R.S. 17:341 et seq., which deprives the Board of the power to

change the racial classification of the Orleans Parish schools, it moved again to dismiss the action on the ground that it "is not a proper party defendant herein."

The Act of 1956 is entitled "An Act To establish a method of classification of public school facilities in any city with a population in excess of 300,000 (in which class New Orleans fits) to provide for the exclusive use of school facilities therein by white and Negro children respectively, the mode of changing the classification of any schools therein, and to provide that white teachers shall teach only white children and Negro teachers shall teach only Negro children". The Act undertakes to provide that a legislative commission shall be appointed to recommend such classifications, to be finally acted upon by the legislature itself, thus depriving the Parish Board of its power to alter its existing pattern of white and negro schools.

Appellant urges that the legislature may, under this method, classify some schools as non-segregated schools, although such action would be violative of the provision in the act which requires that teachers of each race teach only members of their own race.

The trial court held that this statute was unconstitutional on its face and denied the motion to dismiss. The court then entered a permanent injunction against the Board in the precise terms of its prior preliminary order quoted above. The Board has appealed.

We affirm the judgment of the trial court. It is immaterial whether the 1956 law is held by

the State Supreme Court to be constitutional or unconstitutional so far as concerns the correctness of the trial court's judgment. It has long been held that the state officers found to be operating state institutions or performing state functions contrary to the provisions of the Constitution may be enjoined from continuing such acts. *Orleans Parish School Board v. Bush*, 5 Cir., 242 F.2d 156. The trial court has now determined, in accordance with the duty imposed upon it by the United States Supreme Court in *Brown v. Board of Education of Topeka*, supra, that appellees here are entitled to an order directing the Orleans Parish Board to cease operating racially segregated schools at an unspecified future date. Since, under the Act of 1956, the operation of the Orleans Parish schools is still confided to the appellant Board, it is still the proper party to be made subject to any proper court order touching upon the manner of the operation of the schools under its control.

Judgment affirmed.

ON PETITION FOR REHEARING.

TUTTLE, Circuit Judge.

The petition for rehearing is DENIED. Since it appears from appellant's petition for rehearing, citing the two Supreme Court cases most recently applying the principle of federal court abstention from ruling on the constitutionality of, or construing, state laws until they are interpreted by the state courts, *Louisiana Power & Light Co. v. City of Thibodaux*, 79 S.Ct. 1070, and *Harrison v. National Association for the Advancement of Colored People*, 79 S.Ct. 1025, that it does not understand the basis of our decision, we shall attempt to make more clear what was decided in the short per curiam opinion.

Nothing in either of these cases touches upon the issue before us. No cause for abstention by the federal court is shown merely because a suit is brought against state officials whose conduct may be affected by untested state legislation. It is only when the federal court is called on to interpret such state statute or rule on its constitutionality that the rule applies.

In the first of these two cases the trial court was called upon to construe a Louisiana statute. The entire issue before the district court was to be resolved by such construction. In the *Harrison* case the suit before the three-judge federal court was for the purpose of attacking the constitutionality of the Virginia statute, which had not

been construed by the Virginia courts. The court pointed out that the state court construction of it might obviate the necessity for the federal court to make a decision as to its constitutionality.

Here, it has been held repeatedly that the appellant School Board cannot legally continue to operate the public schools confided to its management on a racially segregated basis. No statute of the State of Louisiana can make such management of the schools legally permissible. It makes no difference how the state laws may be changed in order to take away from the Board the power to change the operation of the schools to a non-segregated basis. The Board still cannot operate them illegally. The plaintiffs, under long recognized principles, enunciated by us in *Orleans Parish School Board v. Bush*, 5 Cir., 242 F.2d 156, can, by injunction, prevent the operating agency from acting on behalf of the state in an illegal manner to their injury. Thus, this Board is still the only proper party to be enjoined and it is subject to injunction even though the state in its wisdom might see fit to deprive it of the power to operate legally.

We do not reach any question of construction of the state laws at all, once it is determined that this defendant is the agency engaged in the operation that has now been held to be illegal as to these plaintiffs. No conceivable construction of the state statute can affect this result in the slightest degree. Moreover, it must be borne in mind that this is not a diversity action, but it is an action brought by citizens of the State of Louisiana by virtue of a federal law giving the district court jurisdiction to entertain such a suit. There was no basis for the trial court to abstain from proceeding to a final decision and order in the case, and no basis for us to remand it for a stay.

MINUTE ENTRY

July 15, 1959

This cause came on this day to be heard on motion of plaintiffs for further relief and motion of defendant to vacate notice of taking depositions on oral examination.

Present: A. P. Tureaud, Esq., & Constance B. Motley, Attorneys for plaintiffs.

Gerald A. Rault, Esq., Attorney for Defendants.

Argument;

IT IS ORDERED BY THE COURT that the

Orleans Parish School Board present a plan by March 1, 1960.

(Initialed) J. S. W.

MINUTE ENTRY

October 9, 1959

A conference on the above matter was held in chambers on this day . . .

As a result of agreement reached at this conference,

IT IS ORDERED that the date for the filing of the plan of desegregation by the Orleans Parish School Board be changed from March 1, 1960 to May 16, 1960.

(Initialed) J. S. W.

EDUCATION

Public Schools—Tennessee

Robert W. KELLEY, et al. v. BOARD OF EDUCATION OF THE CITY OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, et al.

United States Court of Appeals, Sixth Circuit, June 17, 1959, Nos. 13,748, 13,749.

SUMMARY: White and Negro patrons of public schools in Nashville, Tennessee, filed an action in federal district court seeking to require the city Board of Education to admit children to public schools in the city without regard to race or color. A three-judge court determined that it did not have jurisdiction, the invalidity of Tennessee constitutional and statutory provisions requiring racially separate schools being conceded by the defendants, and remanded the case to a single judge court. The court found good faith progress toward eliminating segregation in the schools and granted a continuance to the next term of court. 139 F.Supp. 578, 1 Race Rel. L. Rep. 519 (1956). Later a motion to intervene in the case by members of the Tennessee Federation for Constitutional Government was denied by the court. 1 Race Rel. L. Rep. 1042 (1956). On October 29, 1956, the Board of Education adopted a plan providing for the elimination of compulsory segregation in the first grade, beginning with the 1957-58 school year, and setting a date for further consideration of additional integration. 1 Race Rel. L. Rep. 1120. The court approved the plan in part as being a prompt and reasonable start toward complete integration, but directed the Board to submit, before December 31, 1957, a complete plan to abolish segregation in all of the remaining grades. 2 Race Rel. L. Rep. 21 (1957). In August, 1957, the board moved to file a supplemental answer in order to ascertain its authority under, and the validity of, Chapter 11, Tennessee Public Acts, 1957, 2 Race Rel. L. Rep. 215, authorizing boards of education to provide separate schools for white and Negro children whose parents or guardians elect that they attend such schools. The court denied the motion, holding the act in question to be, on its face, antagonistic to the constitutional principles announced in the *School Segregation Cases*. 2 Race Rel. L. Rep. 970 (1957). The board filed with the court, on December 7, 1957, a plan which would authorize the assignment of pupils to one of three categories of schools on a racially segregated or non-segregated basis in accordance with the preference of the parent or guardian. 3 Race Rel. L. Rep. 16. The court ruled against the board's motion to dismiss the case, ruling that the remedy provided by the state Pupil Assignment Act (see 2 Race Rel. L. Rep. 215) is not adequate because the administrative agency to which the school patrons must apply for assignment is the city Board of Education which is "committed in advance to a continuation of compulsory segregation." The court further disapproved the

plan submitted by the board as being unconstitutional, and directed the board to file, by April 7, 1958, "a substantial plan and one which contemplates elimination of racial discrimination throughout the school system with all deliberate speed." 159 F.Supp. 272, 3 Race Rel. L. Rep. 180 (1958). The defendant school board filed a plan on April 7, 1958, calling for the desegregation of an additional grade each school year, beginning with grade two in September, 1958. After hearing, the court held the defendants "have carried the burden of proof to establish the validity of the school board plan" and therefore approved it. —F. Supp.—, 3 Race Rel. L. Rep. 651 (M.D. Tenn. 1958). Plaintiffs appealed from this decision and defendants cross-appealed from the decision disapproving the December 7, 1957 plan. The Court of Appeals for the Sixth Circuit affirmed in both cases. As to the plan approved, the court said the evidence did not indicate that it was "clearly an unreasonable one," in view of the widespread support of the gradual process by Nashville teachers and administrators, for the "persuasive" reason that, having begun as first graders with no sense of discrimination, as the integrated classes progressed through high school "they would know no feelings of racial discrimination, until the entire school had been harmoniously integrated." However, it was observed that the district court, properly retaining jurisdiction, could in the future require an acceleration of the plan should it be shown that more time than necessary was being taken. The approval of the transfer provision was also upheld as no children are barred from schools because of race under it, and the availability of a voluntary transfer to schools attended largely or entirely by members of one's own race does not render the plan invalid. But it was noted that the district court, retaining jurisdiction, could modify its decree if impediments to the exercise of a free choice should appear. Finally, with regard to the cross-appeal, the court concurred in the judgment that the plan for (in addition to integrated schools) separate schools for Negro and white children whose parents voluntarily elect to patronize the latter schools, is patently unconstitutional since under it some schools would be racially exclusive.

Before ALLEN and McALLISTER, Circuit Judges, and CHOATE, District Judge.

McALLISTER, Circuit Judge.

This is an appeal from the judgment of the district court approving a plan of the Board of Education of the City of Nashville, Tennessee, providing for desegregation of the public schools of that city, commencing with the first grade, and proceeding by the desegregation of one additional grade a year until all grades in all public schools have been finally desegregated.

The background of the case is pertinent: The entry of the judgment approving the above plan of desegregating the first grade and compliance therewith by the Board of Education and the school authorities gave rise to violence on the part of criminal elements opposed to desegregation, who wrecked a city school by bombing, and destroyed a synagogue by the same means. Unlawful crowds of disorderly persons caused great trouble and turbulence until the district court restrained one Kasper and others, by injunction, from acts of violence, intimidation, coercion, and incitement. In granting the injunction, the district court declared that the action of the Board of Education in putting into effect the order and judgment of the court "precipi-

tated a situation in the City of Nashville which very nearly approached for some several hours' time—if not for several days' time—a reign of terror, certainly a reign of terror among those parents having children in the public schools, particularly in the first grade schools. * * * [If] it had not been for the decisive way that the City authorities went about discharging their duties, the reign of terror which overwhelmed the City would have been much worse than it actually was." It was the Board of Education of the City of Nashville that, when the trouble started, immediately pressed for the injunction against the acts of violence and coercion; and it was the police of the City of Nashville that curbed the acts of intimidation and enforced public order. It is to be remarked that none of the illegal acts, riotous conduct, or inflammatory propaganda hampered either the district judge or the Board of Education in carrying out their duties, firmly and swiftly, in the face of terroristic threats and disorder that characterize such unlawful groups in every part of the country where riots, arising from any cause, have, in the past, occurred.

[Suit Filed in 1955]

Plaintiff-appellants are Negro children who attend public schools in Nashville, Tennessee, and their parents. On September 23, 1955, on behalf of themselves and others in like position, they filed their complaint in the district court against defendant-appellees, the Board of Education of the City of Nashville, and its members, the Superintendent of Schools for Nashville, and several public school principals. In their complaint, appellants asked for judgment declaring that the laws of Tennessee, requiring segregation of white and Negro children in the schools, were unconstitutional; and they prayed for an injunction restraining appellees from refusing to admit such Negro children to specified schools, solely because of their race. The complaint was subsequently amended to add, as party plaintiffs, two white children (and their parents) who had been denied admission to schools theretofore operated on a segregated basis for Negroes.

To this complaint, appellees filed answer, admitting that they had denied appellant school children admission to the public schools closest to their homes, to which they had applied, solely on the basis of race; but appellees conceded that the segregation laws of Tennessee must, necessarily, yield to the principles declared by the Supreme Court in the so-called School Segregation Cases. Appellees, accordingly, set forth that they intended in good faith to implement the decisions of the Supreme Court; that an Instruction Committee had been appointed by the Board of Education for the purpose of studying the situation; that two comprehensive surveys had been carried out, and two progress reports filed; and that appellees needed more time to formulate a plan for desegregation in the public schools.

Because of the nature of the relief sought in the complaint, asking that the laws of Tennessee requiring school segregation be declared unconstitutional, the case came on for hearing before a three-judge court.

On the hearing before the three-judge court, it appeared that the Board of Education of the City of Nashville had proceeded to investigate and take action after the decision of the Supreme Court in *Brown v. Board of Education*, 349 U.S. 294, which had enunciated the principles that should govern the district courts in formulating decrees to implement its ruling that racial segregation in public schools is unconstitutional. Immediately after the determination in

the above case, the Board of Education began an extensive study to determine the methods to be followed in the school system of the City of Nashville to effectuate the constitutional principles declared by the Supreme Court. These studies included investigation of the programs of other cities in the matter of desegregation, an analysis and review of pertinent books and periodicals, attendance by its representatives at work shops and other group meetings, and the exchange of views between its members and others invited to meet with its Committee.

[Obligation Recognized]

From one of several opinions filed by the district court during the course of these proceedings on different aspects of the case, it appeared that, from the outset, the Board of Education frankly and openly recognized its obligation to maintain the school system upon a racial non-discriminatory basis, and that it had endeavored, by its careful investigation and study of the question, to find a solution which would accomplish the transition as soon as reasonably practicable consistent with the public interest and the efficient operation of the schools. As the court remarked: "The problem confronting the Board of Education was not one which was concerned with a single school but with an entire school system which had been maintained for practically a hundred years—always on a segregated basis, and having an aggregate school population of 27,000 students, of whom 10,000 were Negro students. In this situation the Board concluded that it would need more time to formulate a workable plan of integration."

Such was the aspect of the case before the three-judge court on the complaint for a judgment to declare the Tennessee laws requiring segregation of school children to be in violation of the Federal Constitution. In view, however, of appellees' concessions that the above mentioned Tennessee segregation laws were unconstitutional, and in recognition of their request for further time to formulate a plan of desegregation, a continuance was granted, and, after remanding the case to the district court, an order was entered dissolving the three-judge court.

[New Laws Discussed]

At the October, 1956, term of the district court, the case was called. Apparently there had been widespread discussion about new laws that

might be adopted by the state legislature, and, accordingly, appellees moved for a postponement on the assumption that the 1957 Tennessee legislature might enact statutes relevant to the case. The district court, however, denied such motion for a postponement.

On November 13, 1956, appellees submitted to the district court a plan embodying the following provisions: abolition of compulsory segregation in Grade One of the elementary schools beginning September, 1957; the establishment of a zoning system for Grade One, based on residence, and without reference to race; the establishment of a transfer system allowing the transfer of white and Negro students who would otherwise be required to attend schools previously serving only members of the other race, and allowing the transfer of any student from a school where the majority of the students were of a different race; fixing December 31, 1957, as the date for a further recommendation by the Board of Education's Instruction Committee as to the time and number of grades to be included in the next step to abolish segregation.

After a hearing, the district court held that the plan presented by appellees was inadequate, inasmuch as it did not submit a complete plan to abolish segregation in the public schools; and the Board of Education was, therefore, required to present, by December 31, 1957, a report setting forth a plan to abolish segregation in the remaining grades of the city school system, including a time schedule. The district court retained jurisdiction of the case and withheld the issuance of the injunction prayed for in the complaint, pending the filing of the new plan.

On January 9, 1957, the Governor of Tennessee appeared before a joint session of the General Assembly to propose five bills permitting local authorities to act with respect to questions of racial integration in the public schools.

[Bills Approved]

On January 25, 1957, the bills proposed by the Governor were finally approved by the General Assembly, and, as enacted, included: (1) legislation authorizing the establishment of separate schools for pupils whose parents or guardians voluntarily elected that they attend schools only with members of their own race, generally referred to as the School Preference Law; (2) a Pupil Assignment Act to provide for

the assignment of pupils to public schools by county or city boards of education; (3) an amendment to the then existing law, authorizing the transfer of pupils between school systems; (4) authorization for the joint operation of school facilities; and (5) an amendatory bill dealing with transportation of pupils.

On August 30, 1957, the Board of Education filed a motion for leave to file a supplemental answer and counter-claim, alleging that Chapter 11, Public Acts of Tennessee for 1957, authorized the establishment of separate schools for white and Negro children whose parents elect that such children attend schools with members of their own race; and that petitions had been received from parents urging the establishment of such separate schools, and seeking a declaration of its right to operate separate schools in the light of the prior judgment of the court. After the hearing of arguments on appellees' motion to file a supplemental answer and counter-claim, the district court ruled that the state statute in question was unconstitutional and denied the motion of the Board of Education to file its supplemental answer and counter-claim.

On December 6, 1957, the Board of Education filed with the district court what was termed a complete plan to abolish segregation in all grades of the city school system, which contemplated the establishment of a system substantially the same as that authorized by the provision of the state statute which the district court had previously ruled was unconstitutional. By the terms of this plan, an annual census was to be conducted to determine which parents desired their children to attend schools with members of their own race exclusively, and which parents desired that their children attend schools with members of another race. On the basis of this poll, three types of schools were to be operated: schools for Negro children whose parents preferred that their children attend segregated schools; schools for white students whose parents preferred that their children attend segregated schools; and schools for students whose parents preferred that they attend integrated schools.

[Board Asks Dismissal]

On January 20, 1958, the Board of Education filed a motion to dismiss the case on the ground that the Tennessee Pupil Assignment Act, Chapter 13, Public Acts of 1957, which was ap-

proved a year earlier, provided an adequate administrative remedy which must be exhausted before the rights of appellants to transfer to different schools could be judicially determined. After a hearing in open court on January 28, 1958, the district court, on February 18, 1958, denied the motion to dismiss, stating that the Board of Education was committed to a policy of continuance of compulsory segregation, and that the remedy provided by the Pupil Assignment Act was not adequate. The court further disapproved the plan of the Board of Education filed on December 6, 1957, holding that, like Chapter 11, it failed to meet the test of constitutionality because it would give the sanction of law to a continuation of compulsory segregation in public education. The district court, however, continued to withhold the issuance of an injunction and allowed the Board additional time until April 7, 1958, to file another plan to eliminate racial discrimination in its school system.

On April 7, 1958, the Board of Education filed with the district court a plan for the abolition of compulsory segregation in Grade Two in September, 1958, and in one additional grade a year thereafter, until segregation had been entirely abolished in all primary, secondary, junior high school, and senior high school grades, retaining the zoning and transfer provisions contained in the plan, as theretofore approved by the court.

After a hearing, the district court, on June 19, 1958, filed an opinion approving the Board's plan. On July 17, 1958, findings of fact and conclusions of law were entered by the district court, in accordance with its opinion, and a judgment was entered in which the final plan of the Board of Education was approved in its entirety and appellants' prayer for injunctive relief was denied. The district court furthermore retained jurisdiction of the case during the entire period of transition.

It is contended by appellants that the district court erred in its judgment in that the plan for desegregation of all the grades of all of the public schools of Nashville, as approved by the district court, violates the Constitution, as declared by the Supreme Court, for the following reasons:

(a) That the plan of the Board of Education, instead of providing for immediate desegregation of all grades of all public schools—which it is claimed by appellants is required by law—extended over too long a

period, and did not comply with the direction of the Supreme Court that a district court require a prompt and reasonable start toward integration, and that it take such action as is necessary to bring about the end of segregation in the public schools with all deliberate speed.

(b) That the plan permitting every student, within its provisions, to attend the school designated for the geographic zone of his residence, and, at the same time, permitting the parents of such student to apply for his transfer, where he is one of a racial minority in his zone—or would be required by the zoning to attend a school which previously served only students of the other race—is a deprivation of such child's constitutional rights.

On the other hand, it is contended by the Board of Education and the other appellees and cross-appellants, that the district court erred in holding that the Fourteenth Amendment was violated by a plan based on a statute of the State of Tennessee, enacted after this controversy arose, in which local school boards were authorized to provide separate segregated schools for both white and Negro children whose parents voluntarily elected that their children attend such segregated schools with members of their own race.

Full implementation of the constitutional principles involved in this case "require[s] solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems . . ." *Brown v. Board of Education*, 349 U.S. 294, 299. Therefore, a consideration of the school problems confronted by the Board of Education of the City of Nashville, and the solution arrived at by the Board, is necessary to a determination of the controversy before us.

As above mentioned, at the time of the hearing in the district court, the aggregate public school population of Nashville was 27,000 students, of whom 10,000 were Negro students. There were 38 primary and elementary schools, and 8 senior high schools. Thirteen of the primary and elementary schools are operated for Negro students. Two of the eight senior high schools are operated for Negro students. The Nashville schools employ 1057 principals and teachers, of whom 702 are white teachers, and 355 are Negro teachers. First grade teachers number 115, of whom 73 are white, and 42 are

Negro teachers. There is no difference in the salary schedules of Negro teachers and white teachers; and, insofar as physical facilities are concerned, the public schools of Nashville operated for Negro students are substantially equal to those operated for white students.

[Order Would Affect All Schools]

If an order for total desegregation were entered by the court, every one of the public schools in the city would be affected, although, as to some of the schools, there would probably be one Negro child—or only a few Negro children—in such school zone; and as to others, the same situation applies with regard to white children. The enrollment of all students in Grade One is 12% of the entire school population of Nashville and consists of approximately 3,400 students, of whom 1,400 are Negroes—a ratio of more than 41% of Negro students in the first grade. Here, however, comes into play a factor that complicates the desegregation of schools—residential segregation, one facet of the problem that, like school segregation and other discrimination, results in what might be termed economic segregation, a virtual denial of equal opportunity of work, employment, living conditions, advancement, and income, existing in varying degrees, in every state of the union. In the instant case, because of residential segregation, only 115 of the 1,400 Negro students in the first grade were eligible to attend schools previously attended only by white students, under the zoning system based on residence; and only 55 of the 2,000 white students in the first grade were eligible to attend schools previously attended only by Negro students. All 55 of the white students were, through their parents, granted transfers to white schools, and 105 of the 115 Negro students were, through their parents, granted transfers to Negro schools. In cities having a large Negro population, Negroes usually live, as a group, in certain areas, largely because of the fact that residential restrictions, in the way of restrictive covenants running with the land, have, for many years, made it impossible for them to live elsewhere, and, as a result, especially in cities of the North, they have been confined to rundown residential areas with the poorest accommodations, at high rents. This case is not concerned with that problem, however, but reference is made to the fact as indicating the reason why schools in certain areas are attended wholly by Negro children, both in states

where, heretofore, segregation has been sanctioned by state law, as well as in states where, theoretically, segregation has been condemned.

[Population Shifts]

Based on the zones established by the Board of Education, then, there would probably, at the present time, be Negro children in every school in Nashville, although when the zones were first established, there were, perhaps, ten school zones that did not have a single Negro child in them. The intervening change is due to the continually shifting population. After the order of desegregation in the instant case, there were six of the elementary schools that had both white and Negro children. One of such schools had one Negro child, but on the first day of integration, that school was bombed and destroyed by criminal elements, leaving five schools with children of both races. However, as above suggested, if the parents of Negro students had not asked for the transfer of their children to schools in which the predominant number of students was Negro, there would have been several more schools with students of both races.

After the Board of Education had desegregated Grade One, and the district court had required that a plan for future desegregation in the other grades be submitted, the Board sought the recommendations of the school principals, and, with this objective, the Superintendent of Schools of the City of Nashville called together all of the principals of the 38 elementary schools, announcing to them the necessity of submitting a plan for desegregating the remaining eleven grades. He commenced by stating that he had great respect for their judgment; that they were close to the entire matter; that they were interested in the children; and that he would like to have their suggestions as to the best plan to be adopted.

The principals appointed a committee of themselves to draw up a questionnaire, which all principals were invited to answer, without disclosing their names. The questionnaires were, accordingly, answered by the principals, and thereafter submitted to the Superintendent of Schools. In these replies to the questionnaires, one principal advocated immediate desegregation of all grades in all schools. Thirty-seven principals advocated a gradual plan, or a year-by-year plan. The plan determined upon, after Grade One was desegregated, was to desegregate a grade a year, commencing with the

second grade and continuing year by year until the entire twelve grades had been desegregated. This plan was the one which the Superintendent of Schools subsequently agreed was the best plan, and was the one adopted by the Board of Education, which was submitted to the district court and approved by it.

The reasons why the school authorities supported this plan and considered it the best, under the circumstances, are pertinent to the determination of the issues before us, inasmuch as the solution of such school problems is the primary responsibility of the local school authorities. *Brown v. Board of Education*, supra.

[Superintendent Tells of Difficulties]

In his testimony as to the reasons why he favored the grade-by-grade plan of desegregation, the Superintendent of Schools declared, preliminary to an exposition of his views, that the school authorities had considerable difficulty, which was accompanied by confusion and disorder, when the plan was put into effect, in spite of the fact that they did everything they could to avoid it; that advance registrations were held "so that when the little first-graders registered, there wouldn't be any upper classmen or their parents there. We arranged so that the little Negro children and their parents would not have to go to a school where the majority of the folk were white, to get their transfers. We made the same arrangement with regard to the white children who had to get transfers. We did everything we knew to do, and in spite of everything we could do, we lost about \$70,000 worth of the Hattie Cotton building [through bombing], and a great many little children whose first experience in school should have been one of security and harmony and joy found themselves faced with a situation where they were subjected to dread and fright and, in many cases, actual danger. I think that the effect of that sort of thing on a child is something that should be avoided * * * and I think the year-by-year plan * * * will involve less of this damage to the children than any other plan we could propose. * * * Segregation by race in the public schools of Nashville (right or wrong) is a practice of long standing, and to change it goes counter to the feelings of a great many people. There are a lot of adjustments to be made on the part of the Negro children (it's something they're not accustomed to), on the part of the white children (it's something they're not ac-

customed to), on the part of the parents, and on the part of teachers. It's something none of us are accustomed to. It involves more difficulty in adjustment than someone just looking on from the side lines would recognize or realize, and I firmly believe that this adjustment can be made with less friction, it can be made with less disadvantage to everybody concerned, it can be made more smoothly, it can be made with less difficulty, psychologically, educationally, socially, and otherwise if it is done slowly. This plan, of course, proposes that it be done slowly. * * * I assume that the white race wants to remain a white race and the Negro race want to remain a Negro race as far as race is concerned. The two races live together and work together in the same city and the same community. It's very important that there be between the two races and between individuals representing the two races a relationship of friendliness, cooperation, and respect such as I think we have had in the past to a large degree and which I think has improved a great deal during the past twenty or thirty years."

[Homogeneous Grouping]

Another reason why the Superintendent favored the plan was that it provided for a more homogeneous grouping of students. He stated that in such a homogeneous grouping, consideration was given to several factors, other than race. "In fact, I wouldn't consider that as the principal factor that I had in mind." Rather, he said, it was a matter of background, of aptitudes, of achievement. The matter of homogeneous grouping was something that they had been dealing with in Nashville for a long time before the matter of desegregation arose, and would always continue to be a problem. But the Superintendent felt that the plan of desegregation approved by the district court would make for a more homogeneous grouping of students, which educators felt was a wise thing to achieve. He stated that they could not always have students of just the same aptitude, the same social background, the same chronological age, and the same achievement level; but that they would be further from having such homogeneity if there were quick desegregation. The principal person, he declared, whose welfare is to be considered in the matter of homogeneous grouping, is the student. If desegregation occurred immediately, he went on, there would be a situation where a group of students, or in-

dividual students, would be competing with others at a disadvantage, and a number of students would have to be held back because of others who were not on the same achievement plane with them.

The Acting Chairman of the School Board of the City of Nashville also testified as to the plan approved by the district court, and outlined various plans considered by the Board, and the reasons favoring the grade-by-grade plan. He stated that the Board invited various groups to appear before it; that there were also extremists of both sides who presented their views; that organizations sponsored by groups outside Nashville gave advice and, as experts, sought to give professional and expert assistance; that they were far apart in their views; and that the main concern of the Board was that "the children" whom "everybody had been forgetting, were the ones to be educated, and also we are concerned about obeying the laws of the land." He told about the difficulties encountered when the first grade was desegregated; of the disorders at the schools when every police officer on the force was called into service, "and it was still pretty rough."

[Chairman's Son Involved]

The Chairman had a son who was starting in the first grade. He stated: "I went through the crowd to take my child to school, and if I hadn't been on the Board, he wouldn't have gone back the next day, because it wasn't the right condition for a child to go to school. * * * The next day there wasn't anybody there but about one or two boys, mine and another boy, and a little colored boy. That's just about all they had the rest of the week, so I did not see any use in staying there. * * * They got up as high as fifteen or twenty during the [next] week." The Chairman felt that with the year-by-year plan, the opposition would be less each year the plan proceeded. He stated that, while the main trouble in desegregation came from outside the school, nevertheless there was tension affecting the teachers; but that in spite of the opposition of certain white parents, the teachers were able to handle the situation. It was, he said, a new experience for the teacher. She did not want the white parents "jumping on her neck," and she didn't want to hurt the little colored boy in the class; but the size of the problem had been such that the teachers

had been able to handle it. He felt that the plan, starting with the first grade, and continuing each year up another grade, would be successful. The Negro and white children would already be a part of the class when it went into the higher grade. They would keep their achievement level as they went through their school years; they would have gone through the same educational experiences, from the first grade up to the twelfth grade, year by year. For these reasons, the Chairman felt that the year-by-year plan was the best that could be devised. He stated that consideration had been given to a plan to desegregate first the twelfth grade, then the eleventh, and so down, but the Superintendent had expressed the opinion that such a plan was educationally unsound; and the Board felt that, because of the transfer provisions of the plan, there would be no desegregation whatever in those grades, and that such a plan "would be trying to get around the court order, and we were not trying to do that. We were trying to abide by the court ruling, and not try to get around it. So we switched ends then and started to try to work out the best we could from an educational standpoint."

[Principal Testifies]

Another witness for appellees was Miss Mary Brent, a teacher in the Nashville schools for twenty-four years, and a principal for nineteen years. She told of the first two Negro children in the first grade of the Glenn School, of which she is principal, and of her views in support of the year-by-year plan of desegregation. The educational progress of one of the Negro children, during her first year with white children, had been exceptionally good. For the other, the work had been hard because she was one of the youngest in the age group in the first grade. They both made satisfactory progress, however, and as far as the aptitudes of the two Negro students were concerned, there was no difference as compared to the white students. The witness was the principal on duty when disturbances and violence occurred at the beginning of desegregation; and since that time, up to the hearing in the district court, tension, she said, had continued to exist. The two Negro children were brought to school each day, and afterward, taken home by one of the parents. They were well accepted by the white children in the first grade. Small children, she

stated, have no racial prejudice; but this was not true of older children in the fourth or fifth grades, at the time the first grade was desegregated, when some prejudice was manifested by older students, and trouble occurred. The teachers during the first six weeks were subjected to criticism and arguments from parents coming to the school, and later on, by abusive and vulgar anonymous telephone calls. However, Miss Brent, speaking as a principal, felt that the year-by-year plan was the only one they could accept and make work in Nashville "right now." "If people," she declared, "had been at Glenn School as I was during the last of August and most all of September last year—in 1957, they would realize that it was not an easy thing to do. Any radical change is bound to bring chaos, and this was certainly a radical change."

"Now, in an educational institution," Miss Brent testified, "teachers cannot do their best in the midst of excitement and turmoil and upheaval. I feel that if we can do this and get it over in people's minds that it is the law of the land, that we are trying to do our best to accomplish the purpose that the Supreme Court—the thing that the Supreme Court has set up for us to do, if we do it gradually, let them get accustomed to it gradually, I believe we will have a much better chance of succeeding in the end."

[Feeling Not Forced]

Miss Brent further observed, in her testimony: "To me, integration and desegregation are not the same thing, and we would like very much at the end of 11 years, or however many years it takes, to feel that the schools are truly integrated, that it's not just a question of their being desegregated. That feeling will have to come from the hearts of people. It cannot be forced, and it certainly cannot be thrust upon them in a hurry. In the second place, I feel that little children, for instance, these children in the first grade, now are absolutely accustomed to having the Negro and the white child right there together. They play together. They eat together. Everything goes along just the same. There's no difference whatsoever made. Well, if that group moves on next year to the second grade, they will still be accustomed to that. The children that are coming in in the first grade naturally expect their group to be desegregated.

If you jump and begin to take children in higher grades, you are going to double your trouble. I firmly believe that it is the only plan. * * * We firmly believe now that they have a foundation that will prepare them to go along into the second grade with the white children. They will the next year be able to progress. There will be no differences in their (shall we say) background. We feel that educationally it will be the best thing for the child, and, after all, that is what we are concerned with. We leave the outside trouble to the policemen."

W. A. Bass, Superintendent of Schools of Nashville, when this suit began, testified as to the reasons that impelled him to support the year-by-year plan, and further discussed the difficulties in securing teacher cooperation, as well as questions of teacher recruitment, and achievement levels of the students.

[Reasons for Plan's Support]

As reasons for supporting the Board's plan, Mr. Bass said:

"I think I have two reasons I should like to state: Number one is the—distinct recognition of the fact that the children grow from what they are to what they subsequently become. They don't become what they do become, immediately and at once. And so I based my recommendation on that fact, that adjustment to an entirely new community problem, such as is involved in the change of attitude, the change of practice, the change in tradition that this or that plan of desegregation involves—I reached the conclusion that basing any decision upon the natural growth and development of children would be the only safe and sound approach to the problem.

"Another problem: Schools are not—not just school buildings and just school children. They have teachers there. I took into account the teacher problem and experience I had had with teachers.

"When I came to Nashville as Superintendent of Schools (and this fact can be established in the mouths of many witnesses), I called a meeting of the English teachers in the junior- and senior-high-school groups. It had never occurred to me that I would have any difficulty because as State Supervisor of High Schools I had held conferences all over the state involving both

white and Negro teachers primarily in the county schools.

"Well, the day came for the meeting I had personally called. I was in my office gathering up some material I was taking to the meeting. At that time, our Negro schools were opened ten minutes earlier than the white, and as a consequence they dismissed ten minutes earlier. Our Negro teachers arrived on the scene ten minutes ahead of the white teachers. They went in the room and in a normal manner took their seats in the room.

"Just before I started from my office down to the meeting place, the Principal came down all excited. He said: 'The white teachers won't go in. The Negro teachers have taken their places about over the room, and they won't go in and sit by them.' That was the coldest, most unsatisfactory educational meeting I ever presided over. * * *

And so I had to change my tactics, and I started with the principals and supervisors. We had mixed meetings and we finally got common understanding, but it took 10 years to get that done where the teachers and principals and supervisors would sit down and talk in confidence. * * *

The question, it seems to me, is one of law, what is the best way to comply with the law of the United States as expressed through the Supreme Court. And—I'm in favor of the Board of Education carrying it out. I know what it is. I have read it over and over, every word of it, and I gave considerable thought to that question of 'all deliberate speed.' Now, we deliberated (and I think we were entitled under the Supreme Court's decision to be deliberate) about this matter. We are not just trying to stand in the way. We are trying to determine the scope that we can take and do the job effectively. * * *

I have tried as the Superintendent of the schools, through the principals and teachers at my disposal, to teach people to respect the law, and that I maintain today. * * *

This business of teaching and working through teachers is not just a legal matter. It's a spiritual matter at base, and unless we can develop that rapport which a teaching group must have to touch the lives of children, we are not a successful school system, however good our buildings may be or whatever other physical

features we may have. * * * I think the teachers can't absorb too big a piece of this problem at one time, and I think the community will gradually see that their first impressions were erroneous and that this problem can be handled systematically with mutual benefit."

The witness further testified: "In this community, consisting of the County and City Schools, we need this year three hundred new teachers. It is a problem to get elementary school teachers. It's my job as Superintendent of Schools to interview all applicants for teaching positions in the Nashville Schools. As School Superintendent and as interviewer for the Board, I have discovered that many teachers who might offer their services as teachers decline to teach in a desegregated school system. Now, it's difficult without this problem being raised. It will be more difficult otherwise. The Board knows that. That's what I have reference to by teacher recruitment." He referred to a difference in the achievement level of pupils in the same grade and stated that, on the basis of evidence—test results—the teachers know that, in the field of arithmetic, for example, in the eighth grade, the level of achievement of the white children is two and a half years above that of the Negro children, and that that constituted a teaching problem. He stated that the schools' psychological testing service in 1954-55 released its publication showing that fact, and other facts relating to it; that the difference in the achievement level of the Negro and white students varied in certain subjects, but showed, in the sixth grade, a difference of about two years and some months, and a difference in the achievement level, in the fourth grade, of about one year.

[Testimony of Expert]

With regard to the foregoing, it is to be noted that Dr. Henry H. Hill, President of George Peabody College for Teachers, a former Superintendent of Schools in Pittsburgh, Pennsylvania, as well as in Lexington, Kentucky, and Walnut Ridge, Arkansas, and Dean of the University of Kentucky, called as an expert in education on behalf of appellees, stated: "Children vary widely apart in their ability and willingness to learn, and that is not a racial problem; it's just something everybody knows but few people appreciate the fact; that in the fifth grade, for

example, there will be a range of reading ability possibly from the second grade to the eighth, certainly from the third to the seventh, in an average unselected fifth grade, whether white or Negro, or white and Negro, as far as I know, the variations would only be a little wider. It depends, of course, on the community.

"I would like to point out in this connection that in desegregation in the North, at least in the areas that I am most familiar with, there are all Negro and all white schools, or substantially so. There are all Negro high schools in Chicago, for example; there are in Detroit; and there are in New York, due as much as anything else, not to the fact of segregation of all Negro or all white compulsory, but to the fact that Public Schools, if they are well located, are located in the middle of the children, where the children live. So, if you have a well located school in Pittsburgh, for example, in the Hill District, which is largely Negro, you would naturally expect to find a considerable number, mostly Negroes, in that school even though you have no legal segregation. In other words, I think, and I'm no authority here at all and don't pretend to be an authority anywhere, I think residential movements set the basic pattern."

The plan approved by the district court had been adopted by a vote of all of the members of the Board of Education, with the exception of Mr. Coyness L. Ennix, the sole Negro member, who opposed it on the ground that it unreasonably delayed full desegregation. As indicating one of the complex cross-currents of viewpoint, one of the members of the Board, Mr. O. B. Hofstetter, a witness called by appellants, and a member of the Roman Catholic Church, which had completely desegregated all of its elementary and high schools in Nashville three years before the judgment of the district court in this case, however, favored and supported the Board's plan of grade-by-grade desegregation, in the public schools.

As stated by the district court, the plan of the Board to desegregate the schools one grade each year was strongly supported by the first four witnesses heretofore mentioned; and the court declared that there could be no doubt that the view of these witnesses, based upon their years of experience in education and upon their intimate knowledge of conditions in Nashville, disclosed a sincere belief that a sudden or abrupt transition to a desegregated basis would engender administrative problems of such com-

plexity and magnitude as to undermine seriously and impair the educational system of the city, and that they supported the plan of the Board of Education primarily because they felt that it offered the best opportunity to bring about full desegregation harmoniously and without serious disruption of the educational program of the city.

[Witnesses Opposed]

Opposed to the views of the witnesses for appellees were Dr. Herman H. Long, Dr. Preston Valien, Mrs. Preston Valien, and Mr. Ennix. There was no question that Dr. Long, Dr. Valien, and Mrs. Valien were experts in the field of education, and particularly with respect to the question of desegregation, and, as mentioned, Mr. Ennix, himself, was a member of the Board of Education. Dr. Long was a graduate of Talladega College in Alabama, received his master's degree from Hartford Seminary Foundation, and his doctorate degree in psychology from the University of Michigan. He had taught in Miles College, where he was Dean of Instruction. At the time he testified, he was associated with the Department of Race Relations at Fisk University, in Nashville. Although he had no direct experience as a teacher with the problem of desegregation, he had, nevertheless, assisted in surveys relating generally to practices affecting the status of minority groups in the fields of education, housing, employment, social welfare services hospital services, and the like. In a survey in connection with education in Baltimore, where he was one of those invited to participate by the Governor's Interracial Commission, and the Mayor's Interracial Commission, the teachers of Baltimore were asked whether they would have any difficulties in teaching Negro and white children in the same class, and about 30 per cent of the teachers replied that they would not be able successfully to carry out such teaching assignments; but the following term, the schools were integrated, and the teachers were able fairly successfully to teach both Negro and white children in the same class. With regard to the Nashville plan, Dr. Long said: "I am afraid that a large number of people tend to believe that a special kind of plan used by a school board to desegregate the schools is the final test of whether or not you will have effective desegregation, and the assumption seems to be that if

the plan protracts the process of change over a long period of years (I think this is—basic to the Nashville proposal) that you will have a smoother plan of operation and you will have less difficulty. I believe that this assumption isn't entirely sound in looking at the experience of other school systems and the experiences I have had generally in the field of race relations for several reasons: One reason is that any proposed change in this field as well as in others takes place within a climate of opinion and a climate of expectation that is created by the kind of policies which a Board of Education or which any other board, whether it is a board of—of an industry, creates in the public mind. I think it has been fairly well shown that when policies enacted by such boards are vacillating policies (that is, they do not proceed with clear pronouncement of purpose and without qualification) that when the processes of change in the school system are attempted, you get resistance because the public does not expect that the board means what it says in many of these instances."

[Character of Resistance Noted]

Dr. Long further testified: "[In the Nashville plan] one of the assumptions is that if you minimize the change, you reduce the resistance. We need to analyze the character of the resistance, and if we look at our experience in Nashville last year, the people who constituted the protesters and the mobs, the people who were arrested and fined, either fined in court or put under injunction in the court, expressed an attitude which was completely unreasoning as to any kind of change. I think the pattern that is expressing itself is one in which any kind of change toward desegregating schools or any other institutions will meet resistance on the part of this element of the population. The merits of whether or not the change is done in 12 years or whether it's done in one year doesn't enter into this kind of resistance effort because it is fairly completely unreasoning and inconsiderate effort. It's not an effort to meet the issues in terms of any kind of statesmanship. * * * You have now out of the nine states—of the 17 states that were originally operating on the basis of segregated schools, you have nine of those states which have begun desegregation. You have over 300,000 or 350,000 Negro children in integrated schools within three years' time. You have a

complete—almost complete desegregation of the school systems of West Virginia. All of these instances were where people had the same attitude toward desegregation that I presume we have in Nashville to a more or less degree."

On cross examination, Dr. Long, after stating that he received the *Southern School News* every month, was asked whether he agreed with the statement, in the March, 1958, issue, of Congressman Adam Clayton Powell, when he declared: "I don't believe there should be immediate integration all over the South. But there should be a beginning, a plan in sensitive areas. Integration should start in kindergartens. In this manner, the problem could be eliminated in 12 years." When counsel asked: "Now I believe you take issue with that viewpoint?", Dr. Long's reply was: "I take issue with the viewpoint as—as—It expresses a general philosophy which—with which I concur. I take issue with protracting school desegregation over a 12-year period. I don't think that it solves—I think I gave the reasons why. I think it's—It's the hard way around the problem rather than the easy way around."

Dr. Preston Valien, a professor at Fisk University in Nashville for twenty years, had, with his wife, engaged in studies of desegregated situations in many places, having served as consultants at the University of Kentucky, with teachers at Louisville and Lexington. They had made studies of Clinton, Tennessee, Little Rock, Arkansas, Cairo, Illinois, and St. Louis, Missouri. He considered that the Nashville plan was not educationally sound; that a whole generation of public-school Negro students, beginning, at that time, with those in the second grade, "would be denied the right to have their constitutional rights determined, under this particular plan"; that the situation was calculated to engender tension when there were families in which some children could not go to the same school; that the teachers would be divided into those opposed to teaching desegregated classes, and those not so opposed; that such a plan usually engendered confusion and tension. Dr. Valien stated that "when a large number of people are involved and intimately concerned with a particular social-change process, the transition is likely to be smoother than when it focuses on a smaller number and leaves a large crowd who act as spectators and not concerned in the situation." The witness felt that the schools should be desegregated "on the basis of elementary

schools one period, high schools in another period, and have the junior high school fitting in there somewhere." He advocated the desegregation of each one of these units at a time.

[Participant in Research]

Mrs. Preston Valien, an assistant professor of sociology, with extensive graduate study, has participated in most of the desegregation research that has been done in recent years, in various cities and states. She considered that all experience indicates that where desegregation was done year by year, it merely led to tension; that where desegregation has been done rapidly and completely, the amount of tension is minimized. She stated: "I think that the longer Nashville waits, the less likely it's going to be able to do its job as efficiently and as thoroughly and without less tension than it would have earlier because I think increasingly the longer we wait, the more difficulty and the more tension we vie. And that's in the nature of social change. That always happens. * * * I want to introduce another dimension, though, that I think hasn't been said. I think we have done an awful lot of discussion with reference to what this does for Negroes. As a social scientist, I am concerned about children. I'm concerned about what this does for all people. And in every community where I have been, the one thing that I want to report to this audience is the number of happy white mothers and white children who say that for once I can enter as a citizen and feel whole and complete. No longer do I feel guilty. And one of the things that we have to face, and that is that we are now moving into a world in which there is no place really for the perpetuation of the kind of society which we have. The largest percentage of our people over this world are now colored people. It is unfair to children to give them a false conception of the world in which we now live."

Mrs. Valien testified that she thought Nashville should desegregate its schools, at that time, totally and completely. She considered that the plan should not permit transfers of students, as presently provided, because it was wrong, "sociologically, psychologically, and every other way."

[Board Member Opposed]

Mr. Ennix, the Negro member of the School Board, opposed the plan because he felt that

the Board was not proceeding with all deliberate speed. He had submitted to the Board a plan to desegregate, first, the grades from the first to the sixth; after that, the junior high schools; and after that, the senior high schools. He suggested a two-or three-year stage. At first, he had advocated immediate and complete desegregation, but after 1957, he thought a slower plan was wise, although not a grade-by-grade plan. He considered that the other members of the Board had acted in good faith. He and other members of the Board had often sharply differed on other matters and he always had full opportunity to state his point of view in the meetings, where matters were the subject of free and general discussion by all those present. "I think they were conscientious about what they were saying, and I certainly was conscientious about mine. * * * I think that the Board members, each one of them, conscientiously feel that it is best to go grade for grade."

The district court, in its findings, stated that the Superintendent of Schools, the former Superintendent of Schools, the Chairman of the Instruction Commission (who was also Acting Chairman of the Board of Education), and a principal of one of the elementary schools in which desegregation was first carried out, were unanimous in their sincere belief, based upon their years of experience and upon their intimate knowledge of the conditions in Nashville, that a sudden or abrupt transition to a desegregated basis would engender administrative problems of such complexity and magnitude as to seriously undermine and impair the educational system of the City. The court further found that these four witnesses were convinced that the change-over from a segregated system of public education in that particular area was one of such drastic character, such a reversal of custom, tradition, and settled practice, that disagreement with it is pervasive, far-reaching, and deep-seated; that proper school administration requires that the School Board take into account the existence of this factor, not to accede to hostility or placate the opponents of desegregation, but in order to minimize the effects of opposition upon the efficiency of the schools; and that they support the School Board's plan primarily because they feel that it offers the best opportunity to bring about full desegregation harmoniously and without serious disruption of the educational program of the City.

[No Connection With System]

In commenting in favorable terms upon the educational background and experience of appellants' witnesses, the court observed that they have had no direct or official connection with the public schools of Nashville, other than the single School Board member, and the court noted the disagreement among them as to the best plan to be followed; that Dr. Long and Mrs. Valien favored a plan which would require immediate desegregation in all of the public schools of the City; that Dr. Preston Valien, on the other hand, advocated a plan which would accomplish desegregation on the basis of administrative units, that is, first, the elementary schools would be desegregated, then the junior high schools, and finally, the high schools; and that Mr. Ennix first favored a plan of total and immediate desegregation, but that his views had since been changed to support the administrative unit plan advocated by Dr. Valien, or some gradual plan of a similar nature.

Holding that the appellees had carried the burden of proof of establishing the validity of the School Board's plan, and that it should, therefore, be approved, the court, in its opinion, declared that "it is not the business of the Federal Courts to operate the public schools and they should intervene only when it is necessary for the enforcement of rights protected by the Federal Constitution. If the judgment of the School Board was clearly erroneous, or if it was not supported by the evidence, the Court would be justified in finding that the defendants had not carried the burden of proof resting upon them and that the School Board's plan should be disapproved. However, where in this case, the judgment of the School Board is supported by the clear preponderance of the evidence, it would be an unwarranted invasion of the lawful prerogatives of the legally constituted school authority if the Court should undertake to set its judgment aside and substitute some other plan. Admittedly the problem is not susceptible of an easy solution. The Supreme Court of the United States has made it clear that adjustment must be made in accordance with the exigencies of each case, and that the concept of 'all deliberate speed' is a flexible one. For this reason decisions applying the desegregation doctrine in other cities or areas where different conditions obtain are of little value. Local conditions call for the application of a local remedy.

[No Denial of Rights]

"In approving the present plan no denial of the constitutional rights of the plaintiffs or others similarly situated is involved. Such rights are distinctly recognized and the plan contemplates their full enforcement and application in accordance with a time schedule which though protracted for the best interests of the school system as a whole is nevertheless definite and unambiguous. Full desegregation is not denied. It is merely postponed."

Cases involving desegregation, like other cases, depend largely on the facts. While the law has been stated, perhaps, as definitely as it can be stated at the present time, by the Supreme Court, nevertheless, its application depends upon the facts of each particular case. "[Because] of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." *Brown v. Board of Education*, 347 U.S. 483, 495. "Full implementation of these constitutional principles may require solution of varied local school problems; school authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education*, 349 U.S. 294, 299, 300. The court further went on to say that at stake was the personal interest of the plaintiffs in admission to the public schools as soon as possible on a non-discriminatory basis; that effectuating this interest may call for elimination of a variety of obstacles in making the transition; that courts of equity, may properly take into consideration the public interest in the elimination of such obstacles; that, once a start is made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.

"Of course, in many locations, obedience to

the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation) might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practical completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance." *Cooper v. Aaron*, 358 U.S. 1, 7.

In its opinion in the foregoing case, the Supreme Court, referred to another *Aaron* case which had gone up from the district court, and had been affirmed by the Court of Appeals, 243 F.2d 361, from which judgment no review had been sought in the Supreme Court. In the opinion in this latter *Aaron* case, the district court had relied upon, and quoted from the opinion of the three-judge court, presided over by Judge John J. Parker, sitting in the Eastern District of South Carolina, in the case of *Briggs v. Elliott*, 133 F.Supp. 776, in which that court said, with reference to the rule announced by the Supreme Court in the desegregation cases:

"It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the

children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. * * * Because of the nature of the problems and the local conditions, the school authorities often find that action taken by other school districts is inapplicable to the facts with which they are dealing. * * * [The] free public schools must be maintained and operated as a racially nondiscriminatory system. During the period of transition from a segregated to a nonsegregated system, the school authorities must exercise good faith. They must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. Educational standards should not be lowered. If the school authorities have acted and are proceeding in good faith, their actions should not be set aside by a court so long as their action is consistent with the ultimate establishment of a nondiscriminatory school system at the earliest practicable date." *Briggs v. Elliott*, supra, 864, 865.

In the *Aaron* case, on appeal to the Court of Appeals for the Eighth Circuit, *Aaron v. Cooper*, 243 F.2d 361, the court said: "The District Court's approval of the three-phase plan for integration came only after a finding of utmost good faith on the part of the school authorities, which finding is not challenged in these proceedings. * * * During the trial * * * the superintendent gave convincing and competent testimony to the effect that under existing conditions gradual integration of the schools was administratively advisable. Desirability of gradual as opposed to immediate integration was premised on factors referred to in the second *Brown* decision. The superintendent's testimony was not contradicted." Referring to numerous

cases where the federal courts had used their injunctive powers to speed up, or effectuate integration, the court observed: "These decisions serve only to demonstrate that local school problems are 'varied' as referred to by the Supreme Court," and that what would be a reasonable amount of time to effect complete integration in one city or area, might be unreasonable in another. The court continued:

"It was on the basis of such 'varied' school problems that the Supreme Court in the second Brown decision remanded the cases there involved to the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation. The question of speed was to be decided with reference to existing local conditions. There is here unqualified basis for the District Court's conclusions that the proposed plan constitutes a good faith, prompt, and reasonable start toward full compliance with the Supreme Court's mandate. Accordingly, we cannot say, even if we were so minded, that the District Court's conclusions were entirely erroneous and should be set aside. Nor can we say that a gradual program of integration beginning at the high school level, and ultimately encompassing all grades, is an unreasonable one."

["Deliberate Speed" Considered]

The complaint of appellants is that the plan does not conform to the mandate that desegregation take place with all deliberate speed. As Mr. Justice Frankfurter said in his concurring opinion in *Cooper v. Aaron*, supra: "Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms." In the Court of Appeals, in *Aaron v. Cooper*, 243 F.2d 361 (C. A. 8), it was observed that a reasonable amount of time to effect complete integration, in certain places, might be unreasonable in other places. It was said, in another case, that "a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification of race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation

as appear to be helpful in avoiding unseemly confusion and turmoil." *Orleans Parish School Board v. Bush*, 242 F.2d 156, 166 (C. A. 5).

As to the prospect of shortening the time proposed in the plan, it was said by the Court of Appeals of the Eighth Circuit, in *Aaron v. Cooper*, 243 F.2d 361:

"It may well be, in the light of future events, that the proposed program of integration extends over too long a period and that complete integration of all grades could be effected in a shorter space of time than now anticipated by the board. In that regard, it will be noted that the District Court in its order provided for retention of jurisdiction as directed by the Supreme Court in the second Brown decision. It may be that in the future as the plan of integration begins to operate, a showing could then be made to the effect that more time was being taken than was necessary. Upon such a finding, the District Court would have the power to see that the plan of gradual integration was accelerated at a greater rate than now proposed. That remains for future determination.

"Jurisdiction of this case shall be retained by the District Court to insure full opportunity for further showing in the event compliance at the 'earliest practicable date' ceases to be the objective." *Aaron v. Cooper*, 243 F.2d 361, 363, 364 (C. A. 8).

The findings of the district court was sustained by the evidence. There is no claim that the Board of Education did not act in good faith. The plan is supported by practically all of the teachers in the schools. The reasons for the support of the plan were clearly given by the Superintendent of Schools, the former Superintendent of Schools, by the Acting Chairman of the Board of Education, and by one of the most experienced principals and teachers where the desegregation plan was operating. Among those reasons, including difficulties arising from the recruitment of teachers, was the most persuasive one—that children in the first grade had no sense of discrimination; that as the classes of Negro and white children progressed year by year up through high school, they would know no feelings of racial discrimination, until the entire school system had been harmoniously integrated. One may disagree with the gradual process, but we cannot

say that such a plan is so unreasonable that the judgment of the district court approving the plan, in the light of the evidence before it, should be reversed as clearly erroneous.

[9-Year Period Left]

Also, it is to be said that this year, the first three grades of all public schools in Nashville will have been desegregated, leaving, at most, a nine-year period thereafter for complete integration. Moreover, it may be, as said in *Aaron v. Cooper*, 243 F.2d 361 (C. A. 8), that in the light of future events, the proposed program of integration extends over too long a period and that a complete integration of all grades could be effected in a shorter space of time than now contemplated by the Board. If in the future as the program continues, it could be shown that more time was being taken than necessary, the district court would have the power to see that the plan was accelerated. It is for that reason, principally, that jurisdiction is retained by the district court to insure a full opportunity for a further showing, in the event that compliance with the Supreme Court mandate for desegregation at the earliest practicable date ceases to be the objective of those in positions of authority.¹

We cannot say that the district court's conclusions, in the instant case, were entirely erroneous, and, for that reason, should be set aside; nor can we say that the gradual program of integration beginning in the first grade, and ultimately encompassing all grades, is clearly an unreasonable one. Even were we inclined to differ with the program, and even though we felt that it was too gradual in its application, we could not say that the judgment approving the plan was clearly erroneous, and that the plan, in this regard, was not reasonable.

[Transfer Provisions]

We come, then, to the transfer provision of the plan, allowing the voluntary transfer of white and Negro students, who would otherwise be required to attend schools previously serving only members of the other race; and allowing the voluntary transfer of any student from a school

where the majority of the students are of a different race. This provision does not fall within the ban of the maintenance of segregated public schools by cities where permitted—though not required—by statute, such as was condemned by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483. The district court, in the instant case, considered that, in accordance with the reasoning in *Briggs v. Elliott*, 133 F.Supp. 776 (D. C. S. C.), the transfer provisions did not violate the equal protection clause of the Fourteenth Amendment. In the *Briggs* case, it was declared, as we have heretofore mentioned, that the Supreme Court has not decided that the states must deprive persons of the right of choosing what schools they attend, but that all it has decided is that a state may not deny to any person, on account of race, the right to attend any school that it maintains. "This," said the court, as we have previously quoted, on another aspect of this case, "under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races attend different schools. * * *" Appellants say that the transfer plan is only a scheme to evade the decisions of the Supreme Court. In *Cooper v. Aaron*, 358 U.S. 1, 17, it was said: "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color, declared by this court in the *Brown* case, can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" There is no evidence before us that the transfer plan is an evasive scheme for segregation. If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or a feeling that the child's life will be more harmonious with members of his own race. In common justice, the choice should be a free choice, uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents. The choice, provided in the

1. In *Aaron v. Cooper*, 143 F. Supp. 855, the plan for integration extended over seven years; in *Evans et al. v. Buchanan et al.*, F. Supp. (D. C. Del.), decided April 24, 1959, the plan for integration starts, like the instant case, in the first grade, and proceeds a grade each year until the entire twelve grades are desegregated.

plan of the Board, is, in law, a free and voluntary choice. It is the denial of the right to attend a nonsegregated school that violates the child's constitutional rights. It is the exclusion of children from such a school that "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," as observed in *Brown v. Board of Education*, 347 U.S. 483, 494. Such may be the tragic result, when children realize that society is imposing a restriction upon them because of their race or color. The Supreme Court remarked in the foregoing case that the effect of the separation of students because of race was "well stated" by the district court in the case, then on review, when it declared:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Nevertheless, as stated in *Brown v. Board of Education*, 139 F.Supp. 469, 470, subsequent to the decision of the Supreme Court in the prior *Brown* case:

"Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color."

"If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

[Parent Makes Choice]

While, in the instant case, the parent makes the choice for the small child, that is the only reasonable method, if such a choice may be

made. We see no deprivation of right, under the evidence before us. Doubtlessly, fewer Negro children, or their parents, will avail themselves of the transfer provisions, as grade after grade becomes integrated, and more Negro children attend such desegregated schools as time goes on. We are not informed by the record how much such attendance has increased with the additional desegregation that has taken place since the hearing. But if it should appear, upon a showing, that there are impediments to the exercise of a free choice, and that a change should be made in the plan to carry out, in good faith, and with every safeguard to the children's rights, the mandate of the Supreme Court, the district court, having retained jurisdiction during the entire period of the process of desegregation under the Board's plan, shall make such modification in its decree as is just and proper. On the record before us, the judgment of the district court does not deprive any of the children of equal protection under the Fourteenth Amendment.

We consider, then, the issue that is raised upon cross appeal: whether the Fourteenth Amendment is violated by a plan, authorized by state statute, in which local school boards may provide separate schools for Negro and white children, whose parents voluntarily elect that such children attend school with members of their own race.

The district court held that the statute authorizing the maintenance of separate segregated schools was antagonistic to the principles declared by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, and *Brown v. Board of Education*, 349 U.S. 294, and, therefore, was unconstitutional. The district court referred to the decisions in the above cases in which it was held that segregation of white and Negro children in the public schools of the state, solely on the basis of race, pursuant to state laws permitting or requiring such segregation in segregated schools, denied the Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment. The district court held that the state statute in question was invalid in providing for separate schools for white and Negro children whose parents or guardians voluntarily elect that such children attend schools with members of their own race; that the statute providing for a census and for separate schools for Negro children, whose parents so elected, would be contrary to the

Constitution since such schools would not only be separate, but separated because of race; that the separation, once made, would be compulsory; and that after such election, no Negro student would have the right to attend a school for white children, solely because of his race, nor could any white child, after an election, ever attend a school which was attended by Negro children. The Constitution prohibits the states from maintaining racially segregated public schools. *Bolling v. Sharpe*, 347 U.S. 497, 500.

[*"Voluntary" Argument Answered*]

The argument that the statute contemplated voluntary action was answered by the district court in its opinion by the statement that the statute provided for the maintenance of segregated schools for Negro and white children, from which the children of the other race were excluded; that the statute further provided that, after a census of parents of school children had been taken, and preferences for such segregated schools ascertained, those schools would be required to be maintained thereafter as separate and segregated schools; and that after an election had once been made, it was binding on the child for the future. The court pointed out that the transfer system, which it had approved, giving Negro students and white students an equal right to transfer from one school to another, was a limited right, and the court felt that it was a reasonable provision. It did not envisage the maintenance of schools from which students could be excluded by the authorities, because of their race.

The district court held that it was unnecessary to refer the issue of the constitutionality of the statute to a three-judge court, since the statute in question was patently and manifestly unconstitutional on its face, in the light of the decision of the Supreme Court in the two *Brown* cases above cited; and we concur with the determination of the district court in this regard.

[*Right of Congressional Action*]

The final issue is raised by the brief and argument of the *amicus curiae*: whether, absent appropriate legislation by Congress, for the enforcement of the integration of races in the public schools of the several states, the courts of the United States have power to compel, by court order, the integration of the races in such schools.

The contentions advanced in this argument resolve themselves into the proposition that, as the *amicus curiae* states it, "The decision of the *Brown* case does not rise to the quality of 'Law of the Land.'"

In *Cooper v. Aaron*, 358 U.S. 1, 18, the Supreme Court, speaking in an opinion, unusual in that it was issued under the names of all the justices, said:

"Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Article VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.' Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State * * *.' *Ableman v. Booth*, 21 How. 506, 524.

"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitu-

tion itself becomes a solemn mockery * * *
United States v. Peters, 5 Cranch 115, 136."

The argument of the *amicus curiae* must be held to be without merit in law.

In accordance with the foregoing, the judgment of the district court is affirmed, on the findings of fact, conclusions of law, and opinion of Judge William E. Miller.

EDUCATION

Public Schools—Virginia (Norfolk)

W. Fred DUCKWORTH, George R. Abbott, Linwood Perkins, Lawrence C. Page, Lewis L. Layton, Roy B. Martin, Jr., and N. B. Etheridge, as Members of the Council of the City of Norfolk, the Council of the City of Norfolk, and Alex H. Bell, as Treasurer of the City of Norfolk v. Ruth Pendleton JAMES, a minor, etc. et al.

United States Court of Appeals, Fourth Circuit, May 18, 1959, 267 F.2d 224.

SUMMARY: During November, 1958, to January, 1959, the Norfolk, Virginia, city council passed a series of ordinances and resolutions placing certain restrictions on the use of public funds to operate the city's schools. See 4 Race Rel. L. Rep. 41, 43, 44 (1959). Following decisions on January 19, 1959, by the Virginia Supreme Court of Appeals [*Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636, 4 Race Rel. L. Rep. 65 (1959)] and a federal district court [*James v. Almond*, 170 F.Supp. 331, 4 Race Rel. L. Rep. 45 (E.D. Va. 1959)] declaring the Virginia program of massive resistance unconstitutional, the city council and city treasurer were enjoined by a federal district court from enforcing these ordinances and resolutions or otherwise closing schools or grades by such "an evasive scheme" to perpetuate the massive resistance program as cutting off funds or eliminating specific grades in schools affected by desegregation. *James v. Duckworth*, 170 F.Supp. 342, 4 Race Rel. L. Rep. 55, 57 (E.D. Va. 1959). On appeal, the Court of Appeals for the Fourth Circuit held that the court's conclusion below that the city council's actions had been taken as part of the invalid massive resistance program was supported by the evidence. The court rejected the contention that withdrawal of appropriations was justified (1) as an economy measure, inasmuch as the city continued to assume the school board's contractual obligations, which constituted 92% of the total cost of operations, or (2) as a measure to avoid violence and disorder, the court citing *Cooper v. Aaron*, 358 U.S. 1, 3 Race Rel. L. Rep. 855 (1958). The court further held that the action taken went beyond the council's discretionary power over appropriations and invaded the domain of the school board; that the ordinances of the council amounted to state action within the jurisdiction of a federal court to enjoin as a violation of the Fourteenth Amendment; that the suit was not contrary to the Eleventh Amendment as being against a state because it did not seek to require the state to pay out money, but rather sought to invoke the federal court's power to restrain public officials from acting illegally as individuals in attempting to enforce an unconstitutional statute. In answer to the objection that the injunction decreed below would interfere with the council's police power by requiring it to disburse the entire amount provided by the budget and by forbidding the council to close the schools regardless of later developments, the court emphasized that the injunction is only temporary and, in affirming, it remanded the case with directions that the district court retain jurisdiction with leave to the parties at any time to move for modification of the injunction's

terms. [For previous developments concerning Norfolk, Virginia, public schools and desegregation, see 2 Race Rel. L. Rep. 46, 337 (1957); 3 Race Rel. L. Rep. 942-964, 1155 (1958); 4 Race Rel. L. Rep. 41-65 (1959)].

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

SOPER, Circuit Judge.

This appeal is taken from an order of the District Court whereby a preliminary injunction was issued against the members of the Council of the City of Norfolk, Virginia, and the Treasurer of the City, restraining them from enforcing or applying the provisions of § 22-127.1 of the Code of Virginia as amended by the laws of the Extra Session of the Legislature of Virginia of 1956, c. 67, and also from enforcing or applying the provisions of certain ordinances of the City Council enacted on November 25, 1958, December 30, 1958 and January 13, 1959, respectively, in such a way as to withhold funds appropriated by the Council for the use of the public schools of the city to bring about the closing of any of the schools by reason of the assignment thereto of children of different races.

[*Suit Instituted*]

The suit was instituted on January 15, 1959, by numerous minor children and their parents of the white race in order to forestall the closing of certain grades in the public schools of the city whereby more than 17,000 pupils would be deprived of public education. The complaint charged that the City Council was engaged in an evasive scheme to nullify certain orders issued or to be issued by the District Court in the suit of *James v. Almond*, then pending, which had been instituted on October 27, 1958, by some of the plaintiffs herein in order to secure an adjudication that certain statutes passed at the Extra Session of the General Assembly of the State in 1956 were unconstitutional in that they were designed, as part of a plan of massive resistance, to avoid the decisions of the Supreme Court of the United States directing the desegregation of the races in the public schools of the country. In addition, it was alleged in the complaint that there was also pending in the Supreme Court of Appeals of Virginia a suit sub nom. *Harrison v. Day*, which had been brought to test the constitutionality under the Constitution of the State of some of the same statutes, and it was alleged that decisions in both cases were expected to be filed in accord-

ance with public announcements on January 19, 1959.

These expectations were realized. On that day the Virginia court rendered its decision in *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636, wherein it held that the section of the State Constitution, Const. § 129, which requires the maintenance of a public school system was still in force, although the section of the constitution, Const. § 140 requiring the segregation of the races in the schools had been stricken down by Federal judicial decisions. The Virginia court also held unconstitutional certain statutes of the state designed to prevent the enrollment of white and colored pupils in the same schools by closing them when such an event occurred, and by divesting local school authorities of the power to control the schools and vesting such power in the Governor of the State.

[*James v. Almond*]

On the same day the District Court below, then composed of three judges, rendered its opinion in *James v. Almond*, 170 F.Supp. 331, in which it held that the Commonwealth of Virginia, having set up a system of public schools could not, without violating the Federal Constitution, Const. Amend. 14, act through one of its officers to close one or more of the schools on account of the enrollment of children of different races and at the same time keep open other schools on a segregated basis. The nature of the decision of the three-judge court had been anticipated by members of the City Council because it had been held in numerous decisions in this and other Federal Circuits that attempts by State authorities to avoid the decisions of the Supreme Court of the United States were unconstitutional. It was in this posture of public affairs in the State that the pending suit came to trial on January 26, 1959, and the District Judge was asked to issue a preliminary injunction forbidding the enforcement of the enactments above mentioned on the ground that they were designed to avoid the effect of the decisions of the State and Federal courts and to continue the segregation of the races in the public schools of the City of Norfolk.

The case was submitted to the court upon a stipulation of facts and upon uncontradicted testimony offered by the plaintiffs to the following effect as to the conditions prevailing when the ordinances were passed and the suit was brought. The minor plaintiffs were all entitled to enrollment in the schools to which they sought admission if the schools had been in operation. Three senior and three junior high schools had been closed pursuant to a communication from the Governor of the State dated September 27, 1958, acting under Chapter 68 of the Acts of the Legislature passed at the Extra Session of 1956, subsequently held unconstitutional in the cases cited above. This action on the part of the Governor followed the issuance of an order of the District Court, passed on September 18, 1958, and affirmed by this court on September 27, 1958, in *School Board of City of Norfolk v. Beckett*, 260 F.2d 18, whereby the school board was directed to admit 17 Negro children to certain high schools of the city. By reason of these circumstances the high schools mentioned above were closed to 10,000 white pupils while the colored high schools remained open.

In this situation the City Council on September 30, 1958, prior to the institution of the pending suit, adopted a resolution directed to the Governor and the General Assembly wherein it expressed its earnest desire that the six high schools be immediately opened and operated under a State-operated system provided by statutes passed at the Extra Session of 1956 so that none of the 10,000 children would be delayed in securing the education provided for them by law. The schools, however, remained closed at the time of the institution of the pending suit and until after the decisions of *Harrison v. Day* and *James v. Almond* had been passed.

[November 25, Ordinance]

On November 25, 1958, the City Council passed an ordinance making appropriations for the city budget for the calendar year 1959 in the sum of \$36,887,440.05, which included the sum of \$11,323,338.00 for the public schools, thereby making provision not only for the schools that were open but for the schools that were closed in amounts comparable with those appropriated in previous years. The ordinance recited that, by reason of the pending legal situation with regard to the public schools, the

appropriation for the schools was made on a tentative basis and no part of the funds appropriated should be available to the School Board of the city except as the City Council might, from time to time, authorize by resolution. The City Council also reserved the right to change the appropriation at any time during the fiscal year and to prohibit expenditure of any unexpended portion of the public school funds.

This form of appropriation was made in accordance with §§ 22-126 and 22-127 of the Virginia Code as amended at the Extra Session of 1956. These statutes authorized counties and cities of the State to raise money by local taxation, to be expended by the school authorities for the maintenance of the schools as in their judgment the public welfare required. They also authorized the local governmental authorities to make a cash appropriation, tentative or final, of not less than the sum required by the local school budget for the maintenance and operation of the schools. The governing body of the city was authorized by resolution to direct the School Board of the city or town, and the Treasurer thereof, to make no expenditures of school funds until authorized by the governing body.

[Resolutions]

On December 30, 1958, the City Council adopted a resolution authorizing the transfer of \$1,098,000 to the School Board for its use during the month of January 1959, but stipulated that no part of said sum should be disbursed for the normal daytime operation of the schools then under the control of the Governor of Virginia without his prior approval.

Thereafter, on January 13, 1959, the City Council adopted a further resolution designed to bring about the closing of additional schools of the City of Norfolk, which led to the institution of the pending suit. The ordinance declared that the public welfare of the city required the maintenance and operation of grades 1 to 6 of the public schools of the city but that the City Council did not propose that any part of the funds theretofore appropriated for the city schools for the year 1959 should be paid to the School Board for the maintenance of grades higher than the sixth. The ordinance requested the School Board to make such arrangements as might be necessary to maintain and operate only the first six grades after February 2, 1959. The ordinance, however, provided that the city would

assume the payment of the salaries and wages of the employees of the School Board which became due after that date under contracts between them. It was stipulated at the hearing of the pending suit that if this resolution should be carried out, the six white high schools above mentioned would remain closed and, in addition, the higher grades in thirty-six other schools would be discontinued so that the minor plaintiffs and others similarly situated would be unable to attend the schools, and approximately 7,000 additional children of the city, making 17,000 children in all, or 40 per cent of the normal school population, would be deprived of the benefits of a public school education.

[Part of Massive Resistance Plan]

These circumstances justified the conclusion of the judge that the action of the City Council was taken as part of the plan of massive resistance adopted by the Extra Session of 1956 to retain segregation in the public schools of the State. A glaring inconsistency is manifest between the earlier action of the City Council and that which was taken later when it became apparent that the plan of massive resistance had failed. On September 30, 1958, the City Council declared that it was necessary for the immediate preservation of the public peace, property, health and safety of the city to provide for the daily operation of the public schools and that for this purpose the closed high schools should be immediately opened and operated, pursuant to the Acts of the Assembly. But on January 13, 1959, when the decisions of the courts above mentioned were imminent, the City Council declared that it was necessary for the immediate preservation of the public peace, property, health and safety that all of the schools higher than the sixth grade be closed and that none of the funds appropriated therefor should be used for their maintenance and operation.

The only reasonable explanation for this change of view is that the City Council, realizing that the general plan of massive resistance had failed, took steps to avail itself of the authority conferred by § 22-127.1 of the Code to withdraw the appropriation it had already made and thus accomplish at least a part of the original plan. This statute was indeed part of the general scheme which the General Assembly in the Extra Session had enacted. The response to this new

plan by a large part of the white population, who desired to keep all the schools open, was the present suit.

In opposition to this conclusion, defendants refer to the testimony of members of the City Council to the effect that the ordinance of January 13, 1959, was passed not to evade constitutional prohibitions against segregation but on account of serious doubts as to the extent to which the State's financial support of the schools would be curtailed and in the genuine belief that serious disorders and destruction of school property would occur if the races were commingled in the public schools; and it is added that the absence of good faith on the part of the Council is not shown by the fact that no disorder actually occurred when the six high schools were opened very shortly after the decisions in *Harrison v. Day* and *James v. Almond* had been filed.

[Economy Argument Rejected]

This testimony, however, is largely offset by the City's assumption of all the contractual obligations of the School Board, which comprised 92 per cent of the total costs of operation, with the result that although all of the grades above the sixth would be closed the teachers would continue to draw their salaries. The excuse that the upper grades were closed in order to avoid violence and disorder is also frail, in view of the fact that desegregation of the lower grades was not contemplated. In any event, the excuse cannot prevail over the established rule that the preservation of the public peace cannot be used to justify the violation of constitutional rights. See *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19. We are of the opinion that the judge's finding as to the purpose and effect of the ordinance was sustained by the evidence.

The defendants nevertheless contend that, even if the purpose of the City Council was to avoid the effect of the judgment of the District Court, the ordinance of the City Council was a valid exercise of the power given it by the Virginia statutes to control the appropriation and expenditure of school funds. It is pointed out that the Federal District Court has no power to regulate or control the Norfolk schools and made no attempt to do so in the judgment in the *Beckett* case; and that, on the other hand, the City Council is not obliged to adopt the budget submitted to it by the School Board but may appropriate such moneys for the schools as it

sees fit and, moreover, has the power under §§ 22-127 and 22-127.1 of the Virginia Code to appropriate school funds tentatively or finally, and if it appropriates funds on a tentative basis, they are not available to the School Board except as the transfer of them may be authorized from time to time by the City Council.

[Invasion of Board Domain]

The answer to this argument is obvious and clear. The City Council in the ordinance under attack did not confine itself to the area of its discretionary power over appropriations. It went further and invaded the domain of the School Board and attempted to exercise the power to operate the schools vested in the school authorities by the State Constitution when it took steps to bring about the closing of all school grades above the sixth in the city school system. The decision of the Supreme Court of Appeals of Virginia in *Harrison v. Day* demonstrates the invalidity of this action. It was there shown that § 129 of the State Constitution requires the State to maintain an efficient system of public schools throughout the State and that such a system embraces such factors as a sufficient number of schools with adequate buildings and equipment, a sufficient number of competent teachers and other basic needs associated with the public school system; and that § 133 of the Constitution vests the supervision of the schools in the local school boards and § 136 requires that local school taxes be expended by local school authorities. By reason of these requirements of the Constitution, the court held that the General Assembly of the State could not establish a school system divesting the local school authorities of power and control over the local schools and vesting such authority in the Governor and State Board of Education. Much less can the City Council of Norfolk, notwithstanding its control of the purse, arrogate to itself the power to operate the public schools of the city.

[State Action Under 14th Amendment]

The defendants say, in the alternative, that if the ordinances of the City Council exceeded the powers granted by the statutes of the State they did not constitute State action, and hence the District Court had no jurisdiction to enjoin them as a violation of the Fourteenth Amendment.

This proposition cannot be sustained under the existing circumstances. It is "settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment", *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949. In the case of a municipal corporation, the State charter creates the legislative body and grants it power to act within a certain area. In the pending case the City Council was empowered to make appropriations, tentative or permanent, for the support of the schools, and hence the acts of the City Council in a sense became the acts of the State. And even if the power was misused in violation of the Federal Constitution, the Federal courts may issue an injunction in the same way as if an act of the General Assembly of the State had been passed in violation of constitutional rights. Indeed, the decisions go further and confirm the jurisdiction of the Federal courts to enjoin the acts of state officers who have been placed in positions of authority by the state and make invalid use of their power. Questions of this kind are not to be decided under the law of agency with reference to the power of an agent to bind his principal. In *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287, 33 S.Ct. 312, 315, 57 L.Ed. 510, the Court said:

"* * * Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

See also *Screws v. United States*, 325 U.S. 91, 109-111, 65 S.Ct. 1031, 89 L.Ed. 1495.

The decision in *Barney v. City of New York*, 193 U.S. 430, 439, 24 S.Ct. 502, 48 L.Ed. 737, upon which the defendants chiefly rely, is not controlling here. The expressions of opinion therein, which may seem at variance with what has been said above, have been expressly disapproved by the later decisions of the Supreme Court. *Home Tel. & Tel. Co. v. City of Los Angeles*, supra, 227 U.S. at page 294, 33 S.Ct. at page 317; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 246-247, 52 S.Ct. 133, 76 L.Ed. 285; *Snowden v. Hughes*, 321 U.S. 1, 13, 64 S.Ct. 397, 88 L.Ed. 497.

[Eleventh Amendment Invoked]

The additional contention is made that the suit must be dismissed as a suit against the State of Virginia. It is said that the purpose and effect of the injunction is to control the use of state and city funds in the State Treasury and to compel their expenditure in the operation of the schools; and hence it is in essence a suit against the state by a citizen of a state contrary to the Eleventh Amendment. The contention is that the maintenance of such a suit would be contrary to the rule laid down in such cases as *In re Ayers*, 123 U.S. 443, 8 S.Ct. 164, 31 L.Ed. 216; *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 66 S.Ct. 219, 90 L.Ed. 140; *O'Neill v. Early*, 4 Cir., 208 F.2d 286, which, for the most part, involve state debts and money in the state treasury and hold that suits may not be maintained against state officers where the purpose is to establish and compel the payment of a money obligation due by the state.

The plaintiffs in the present suit, however, do not seek an injunction to require the State to pay out any money. The school funds to be used in the operation of the Norfolk schools have already been tentatively appropriated by the City Council subject to its further order and the plaintiffs merely ask that the City Council be restrained from exerting its power of control in such a manner as to violate the constitutional rights of the pupils of both races residing in the City of Norfolk. The applicable rule as laid down in *In re State of New York*, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057, was quoted by Judge Parker in *O'Neill v. Early*, supra, to the following effect (208 F.2d at page 288):

"Thus examined, the decided cases have

fallen into two principal classes, mentioned in *Pennoyer v. McConaughy*, 140 U.S. 1, 10, 11 S.Ct. 608 [699], 35 L.Ed. 363: 'The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts (citing cases). The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit * * * is not, within the meaning of the Eleventh Amendment, an action against the state.' The first class, in just reason, is not confined to cases where the suit will operate so as to compel the state specifically to perform its contracts, but extends to such as will require it to make pecuniary satisfaction for any liability. *Smith v. Reeves*, 178 U.S. 436, 439, 20 S.Ct. 919, 44 L.Ed. 1140 * * *

See also *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628, where it was held (337 U.S. at pages 697-702, 69 S.Ct. at pages 1465-1467) that the court may entertain a suit against a state officer for relief from actions in his official capacity—if the actions are illegal in the sense that they are not within his statutory powers, or, if the statutory powers cover the action but are constitutionally invalid or are exercised in an unconstitutional manner.

[Not State Action Under 11th Amendment]

The present case falls within the class of cases where a public officer or agent makes use of his authority to perform an illegal act by invoking the command of an unconstitutional statute or seeks to carry out a valid statute in an unconstitutional manner. In such cases, it is held that his action is not the act of the state but the act of an individual, which may be restrained by the injunctive power of the Federal court. An analogous case is the decision of the Fifth Circuit in *Cook v. Davis*, 178 F.2d 595, where a Negro teacher in Georgia sought a declaratory judgment and an injunction against Atlanta school officials, prohibiting them from a

salary discrimination aimed at teachers of the Negro race. It was there held that the suit was not, either in name or in effect, a suit against the State of Georgia, forbidden by the Eleventh Amendment.

Particular objection is made to paragraphs 3(b), (c), (d) and (g) of the injunction. Paragraphs 3(b), (c) and (d) prohibit the withholding of funds from the public schools appropriated by the budget ordinance of November 25, 1958, and from enforcing the restrictive provisions therein, which declare that the appropriation was made on a tentative basis and that no part should become available except upon resolution by the City Council, and reserve the right to change or cancel the unexpended part of the appropriation at any time during the fiscal year. Paragraph 3(g) prohibits the City Council from closing any school or any class in any school in the City of Norfolk in the exercise of the police power for more than two consecutive days without prior approval of the court. It is urged that these provisions would require the City Council to disburse the entire amount provided by the budget regardless of all circumstances or unexpected emergencies even though the City Council should be deprived of the as-

sistance of State funds by later enactment of the General Assembly of Virginia in the exercise of its power to control the disposition of State funds. It is also contended that the restriction of the police power of the City Council to close the schools in case of emergency is an unwarranted interference with the activities of the Council and beyond the power of the Federal court.

[Preliminary Nature of Injunction]

We do not understand the preliminary injunction to be a final adjudication of the rights of the parties, but rather an order passed in an emergency to preserve the right of the plaintiffs to a public school education. But in order that there may be no misunderstanding on this point and no interference with the rights and duties of the City Council in the execution of its powers, the judgment of the District Court will be affirmed and the case remanded for further proceedings, with direction to the court to retain jurisdiction of the case with leave to any party at any time to move for modification of the terms of the injunction.

Affirmed and remanded.

EDUCATION

Public Schools—Virginia (Arlington)

Clarissa S. THOMPSON et al. v. COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA et al.

United States District Court, Eastern District, Virginia, July 25, 1959, Civil 1341.

SUMMARY: The Virginia Pupil Placement Board in 1958 denied the applications of 30 Negro students to transfer to "white" Arlington schools. A federal district court, on review, however, ordered the admission of four but stated that it could not be said then that the other 26 had been rejected without substantial supporting evidence. 166 F.Supp. 529, 3 Race Rel. L. Rep. 931 (E.D. Va. 1958). Subsequent to the invalidation of the state's "massive resistance" program [See *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636, 4 Race Rel. L. Rep. 65 (1959) and *James v. Almond*, 170 F.Supp. 331, 4 Race Rel. L. Rep. 45 (E.D. Va. 1959)], the Court of Appeals for the Fourth Circuit remanded the case as to the 26, with directions to issue an injunction ordering the county school board to re-examine their applications. 264 F.2d 945, 4 Race Rel. L. Rep. 296 (1959). When 22 of the 26 renewed their applications for the 1959-60 school year, the school board again denied them. On applicants' petition for review, the district court, while approving the criteria for assignment used by the board,

found that two of the criteria had not been uniformly applied. Although there was ground for refusing admission of applicants to already overcrowded white schools in 1958, the court said that factor would not suffice in 1959. As to applicants rejected for being below the median achievement level of the white classes they desired to enter, the court ruled that the board was warranted in not increasing the number below those lines in already-constituted classes in 1958, but that those Negro applicants having equal or better achievement standings than the lowest standing white pupil enrolled could not now be so denied admission to the newly-constituted 1959 classes. The court, however, overruled petitioners' contention that "I.Q.," rather than achievement, should be the measure for admittance. The denial of ten applications on the basis of attendance area restrictions was upheld, no arbitrariness or racial discrimination in the administration of this criterion having been found. Twelve petitioners were, therefore, ordered admitted to specific white schools, but the motion for a desegregation plan was denied as the court's order provides the relief contemplated by the plan. [For previous developments as to Arlington and public school desegregation, see 1 Race Rel. L. Rep. 890 (1956); 2 Race Rel. L. Rep. 59, 300, 810, 987 (1957); 3 Race Rel. L. Rep. 187, 931 (1958); 4 Race Rel. L. Rep. 36, 296 (1959)].

BRYAN, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The petitioning twenty-two pupils, with four others*, were denied admittance to the "white" schools of Arlington County, Virginia for the 1958-59 session. Pursuant to the mandate of the Court of Appeals in this case, on the petitioners' appeal from the judgment here refusing to disturb the determination of the School Board, the Board has reconsidered their applications, to be effective in the session 1959-60, and has again denied them. The applicants now ask this court to review the last decision of the School Board.

The criteria used by the School Board in 1958, and then for the most part approved by the court, have been employed by the Board in the present assignments. The criteria are still approved. But in some instances the application of the criteria by the Board this time has not been uniform as between the white students and the Negro petitioners.

As pointed out in the findings and conclusions of this court in September, 1958, 166 F.Supp. 529,535, reasonable and fair tests for the applicants' acceptance were then justified even though such criteria had not been used theretofore. This was because their admission presented an unexperienced situation. It was, of course, understood that thereafter the criteria would be applied evenly, without regard to the race or color of the pupil. The inequalities become apparent as we review each of the applications.

REJECTION FOR OVERCROWDING

Pupils 1, 12, 19, and 21 were refused admission to Washington-Lee High School because of its overcrowded condition. These students, concededly, live in the Washington-Lee District. As transfers seeking Washington-Lee as their school in September, 1958, there was ground for turning them away when the school was already filled beyond capacity. But now they cannot be singled out for rejection for overcrowding alone. The Board's rejection of these four on this score cannot stand.

REJECTION FOR DEFICIENCY OF ACADEMIC ACCOMPLISHMENT

The eighteen pupils—A, B, 2, 3, 4, 5, 8, 9, 10, 11, 12, 14, 15, 21, 22, 23, 24, and 25—now excluded for failure to meet the academic tests were, with the exception of A, turned down for the same reason in September, 1958. * * A was then refused entrance only for want of "adaptability". That criterion has not been used this year in any instance. The reasoning on their rejection last year was that they were below the median achievement level of the white classes they desired to enter, and some of them under the National median as well. There were, of course, white students in these classes under those levels, but the School Board was warranted in not increasing the number in a class below these lines.

Now, however, the classes are about to be constituted anew. Therefore, they cannot be declined admission to a class if other children of the lower-half standing are to be accepted.

Should any classes be established with reference to the National median or some other standard, admitting only those above it, then any white or Negro pupil not possessing these qualifications could be excluded from those classes, provided all students were given an equal opportunity to enter such classes.

In this connection note is taken of the applicants' contention that mental maturity or the intelligence quotient—the potential for learning—should be a measure for admittance rather than actual academic achievement. The School Board has, on substantial evidence, preferred the latter principle and the court cannot say its selection is unfounded.

Specifically, it appears that in academic accomplishment none of the eighteen now turned away, except 3 and 25, are under the lowest of the other students in the requested schools. According to the 1958 chart, the two excepted pupils were more than three years under the National norm, more than that under the "white" school median, and well behind the lowest white pupil's standing. If this relative standing obtained in 1958-9, as the court is led to believe, there is a reasonable basis for not putting these two in the schools requested. Hence, none of the eighteen, except 3 and 25, can now be refused admission solely on academic grounds.

REJECTION ON ATTENDANCE AREA RESTRICTIONS

The applications of 2, 3, 4, 9, 14, 15, 18, 23, 24, and 25 have again been denied because they live outside the districts of the schools sought. All of them live within the Hoffman-Boston School area. Five—2, 3, 14, 15, and 25—are senior high school students and Hoffman-Boston is the nearest school of that type to them. The Board has placed them there. The other five are junior high students. For them both Jefferson and Gunston are slightly closer, but they have been assigned to Hoffman-Boston Junior High.

Considering school bus routes, safety of access and other pertinent factors, it cannot be found

that the School Board's assignments are arbitrary or predicated on race or color. The bounds of Hoffman-Boston district do not deprive those within it of any advantage or privilege. Actually, they are afforded schools of better pupil-teacher ratio and of less congestion than any in the County. Proximity is not the only test. School divisions must at some points disregard neighborhood lines. The court cannot draw the boundaries for attendance areas.

CONCLUSION

To repeat, in the present assignments the criterion of overcrowding has been unevenly applied. This is also true of the test of academic achievement, except as to 3 and 25. With this exception, these rejections are contrary to law and must be vacated. As formerly, the psychological tests have not been sustained. The area attendance requirements, however, are upheld and pupils 2, 3, 4, 9, 14, 15, 18, 23, 24, and 25 will remain as now assigned by the School Board. The result is that the following twelve petitioners will be admitted to the following schools:

Robert A. Eldridge	to	Patrick Henry Elementary
Leslie Hamm	to	Stratford Junior High
Charles L. Augins	to	Washington-Lee High
Dwight Carmichael	to	Stratford Junior High
Lessie Carmichael	to	Stratford Junior High
Algie Faggins	to	Stratford Junior High
Barbara Harrison	to	Stratford Junior High
Yvonne Holmes	to	Stratford Junior High
Warren Hunter	to	Washington-Lee High
Joyce Strother	to	Washington-Lee High
Stephen Thompson	to	Washington-Lee High
Anita Turner	to	Stratford Junior High

This statement is adopted by the court as its findings of fact and conclusions of law. The motion for a plan for desegregation will be denied at this time, as the orders in this case provide the relief and remedy contemplated by the plan. An appropriate order will be made by the court.

*These four did not renew their applications for the 1959-60 session.

**In this review the parties relied, with slight exceptions, upon the ratings as proved at the September, 1958 trial.

EDUCATION

Colleges and Universities—Louisiana

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY, Etc. et al. v. Wilson FLEMING, Jr. et al.

United States Court of Appeals, Fifth Circuit, April 23, 1959, 265 F.2d 736.

SUMMARY: A federal district court enjoined the Board of Supervisors and officers of Louisiana State University from denying certain applicants and others in their class admission to the University in New Orleans, and the University officials appealed. The contention that the Board is a special agency of the state so that the suit against it was in effect against the state contrary to the Eleventh Amendment, was rejected by the Court of Appeals for the Fifth Circuit on the ground that agents of the state who attempt to use state power in violation of the Constitution cease to represent the state and may be enjoined from such attempts. The court also rejected the argument that the applicants had failed to exhaust administrative remedies prior to the suit, because they had been officially notified of the Board's policy not to permit admission of Negroes, and the law does not compel the doing of a useless thing. The judgment was affirmed.

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

PER CURIAM.

This appeal is from the district court's judgment enjoining the Board of Supervisors of Louisiana State University and Agricultural & Mechanical College, Theo F. Cangelosi, Acting Chairman of the Board of Supervisors, Troy H. Middleton, President of the University and W. R. Burleson, Registrar of the Louisiana State University in New Orleans, from denying the appellees and members of their class admission to Louisiana State University in New Orleans.

Appellants contend that the rule set forth in *Ex parte Young*, 1908, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, however applicable to state officials as individuals, cannot be extended to the Board of Supervisors of Louisiana State University. They argue that the Board is a special agency of the state and a suit against the Board, in effect, would be a suit against the State of Louisiana contrary to the Eleventh Amendment. This Court held to the contrary in *Orleans Parish School Board v. Bush*, 5 Cir., 1957, 242 F.2d 156. See also *Dorsey v. State Athletic Commission*, D.C.La. 1958, 168 F.Supp. 149. We agree with the Fourth Circuit in *School Board of City of Charlottesville, Va. v. Allen*, 4 Cir., 1956, 240 F.2d 59, 63:

"If high officials of the state and of the federal government, * * * may be restrained

and enjoined from unconstitutional action, we see no reason why a school board should be exempt from such suit merely because it has been given corporate powers. A state can act only through agents; and whether the agent be an individual officer or a corporate agency, it ceases to represent the state when it attempts to use state power in violation of the Constitution, and may be enjoined from such unconstitutional action."

Louisiana Land & Exploration Co. v. State Mineral Board, 5 Cir., 1956, 229 F.2d 5 is distinguishable. In that case the acts complained of were done pursuant to valid statutory authority.

The argument that the appellees failed to exhaust their administrative remedies before instituting this suit is not tenable in view of the decision of the institution, evidenced by two letters from the Registrar, that "the policy of the Board * * * does not permit * * * admission [of negroes]". The law does not require the doing of a vain and useless thing. *Gibson v. Board of Public Instruction of Dade County*, 5 Cir., 1957, 246 F.2d 913; *Orleans Parish School Board v. Bush*, 5 Cir., 1957, 242 F.2d 156; *Kelly v. Board of Education of City of Nashville*, D.C.Tenn.1958, 159 F.Supp. 272.

The judgment is Affirmed.

EDUCATION Teachers—Missouri

Naomi BROOKS et al. v. SCHOOL DISTRICT OF CITY OF MOBERLY, MISSOURI, etc., et al.

United States Court of Appeals, Eighth Circuit, June 17, 1959, 267 F.2d 733.

SUMMARY: Eight Negro public school teachers in Moberly, Missouri, brought a federal court action, seeking a declaratory judgment, injunction, and damages against the local school board and superintendent alleging a policy of racial discrimination in re-hiring teachers after the local public schools were integrated in 1955. Defendants denied that discrimination had been practiced. Under the integration plan the formerly colored school was closed and fewer teachers were needed, and as a result, the board declined to renew the contracts of four of the 98 white teachers and all eleven of the Negro teachers. It was conceded that some of the Negro teachers discharged had a greater number of college credits and/or more years of teaching experience than some of the white teachers employed. However, under the board's rule that the superintendent should recommend teachers for appointment "on the basis of merit, determined . . . from the applicant's qualifications, training, experience, personality and ability to fulfill the requirements of the position," the defendants contended that in each case the teachers employed were better qualified, considering the "intangible elements" in the rule, than any of the plaintiffs. The trial court dismissed the complaint, holding that no racial discrimination had been established and that the board had fairly applied its rule in determining who should be employed. 3 Race Rel. L. Rep. 660 (N.D. Mo. 1958). On appeal by seven plaintiffs, the Court of Appeals for the Eighth Circuit affirmed. Though conceding that the results were "unusual and somewhat startling" and that "in the usual situation considering the number of applicants involved, one would suppose that a fair application of standards would result in the re-employment of some of the Negro teachers," the court concluded that there was substantial evidence to support the trial court's finding.

Before SANBORN, VAN OOSTERHOUT and MATTHES, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Plaintiffs, seven Negro school teachers, who were employed by the defendant School District to teach in its segregated school maintained for Negroes during the 1954-1955 school year, and were not reemployed when the school system was integrated commencing in the fall of 1955, appeal from final order entered October 2, 1958, dismissing their complaint praying for declaratory judgment, an injunction, and damages.

Plaintiffs' cause of action is based upon their claim that the defendants denied them reemployment after integration solely because of their race or color, pursuant to a rule, practice, or custom of the Board of Education not to employ Negro teachers. Plaintiffs allege that such practice, policy, custom, or usage is in violation of their rights under the Constitution and laws of the United States, particularly the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C.A. §§ 1981, 1982, and 1983.

There is no dispute between the parties as to the applicability of the Fourteenth Amendment. The defendants admit that any rule, practice, or

custom denying plaintiffs reemployment because of race or color would be discriminatory and in violation of plaintiffs' constitutional rights.

[Federal Question Jurisdiction]

The trial court properly determined it had jurisdiction to consider the alleged violation of plaintiffs' rights protected by the Constitution and laws of the United States.

Prior to integration the Board operated six white elementary schools, a white junior high school, a white junior college, and a combined elementary and high school for Negro students known as the Lincoln School. During the school year 1954-1955, the Board employed 109 teachers. Ninety-eight white teachers served in the white schools. Eleven Negro teachers taught in the Lincoln School. Plaintiffs are seven of the eleven teachers employed in the Lincoln School.

The defendant Board, immediately after the decision of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, commenced the necessary study looking toward the integration of its schools. After seeking

the views of all races, an acceptable plan of integration was worked out and was placed in effect at the opening of the fall term of 1955. It is stipulated that, "the Board of Education of Moberly, Missouri, fairly and honestly and expeditiously went about and conducted the integration of the colored pupils and the white pupils in the Moberly School System prior to the filing of this suit." Because of this stipulation it is unnecessary to set out the detailed evidence pertaining to the development of the integration plans. It should be said, however, that the original proposal contemplated the use of the Lincoln School as a unit of the integrated system, but this plan was abandoned when substantial objections thereto were made by both races. The Negroes opposed the retention of Lincoln as a voluntary segregated school, and no effort was made to retain the segregated school. The integration plan finally adopted called for the closing of the Lincoln School, and provided that pupils of all races would attend the integrated school in the district in which they lived.

[Fewer Teachers Required]

As predicted by the Integration Committee, the plan adopted required fewer teachers than were needed under the former system. The Board's determination that the teaching staff could be reduced by eleven teachers is unchallenged. At a Board meeting held on April 13, 1955, the Board decided not to renew the contracts of the eleven Negro teachers, and took similar action as to four white teachers. The teachers not employed were given statutory notice to that effect.

The Negro teachers, prior to integration, were employed by the School District which operated all of the Moberly schools. The Board, in its consideration of employment of teachers for the school year 1955-1956, attached no significance to the fact that Lincoln School was closed, and did not decline reemployment to the Negro teachers upon the basis that the teaching positions which they had previously filled no longer existed. Instead, the Board endeavored to compare the qualifications of all teachers of both races in reaching its determination as to which teachers should be reemployed.

All witnesses offered on behalf of the Board denied that the Board had any rule, practice, or custom to refuse employment to Negro teachers because of their race, and also denied that plain-

tiffs were in any way discriminated against because of their race. The Board's position is that, at the April meeting and at all subsequent meetings at which vacancies were filled, the plaintiffs were given full and fair consideration for all teaching positions which they were certificated to fill; and the Board maintains that in each instance the teachers employed were better qualified than any of the plaintiffs to fill the teaching positions available.

[Stipulations]

Among the stipulations of the parties are the following:

"For the purpose of this case, it is stipulated that the rule of the Board of Education of the Moberly School District which was in force at the time of integration, with respect to the basis upon which the Superintendent should recommend the employment of teachers to the Board, and under which the Board should employ the teachers, was a proper rule and was fair and just, said rule being as follows:

"All applications for employment in Moberly public schools must be in writing, and submitted to the Superintendent's office. All persons to be employed shall be recommended by the Superintendent and appointed by the Board of Education. Recommendations for appointment shall be made on the basis of merit, determined by Superintendent from the applicant's qualifications, training, experience, *personality and ability to fulfill the requirements of the position*. All employees must be physically fit to serve efficiently. Teachers are to file a health certificate with the Superintendent before assuming their duties."

"(5) For the purpose of this case, it is stipulated that it was the duty of the Board of Education of the Moberly School District to employ in said district the teachers who, in their judgment, best complied with the rules relating to the employment of teachers hereinbefore referred to, and it is further duty of the Superintendent to make his recommendations to the Board on the same basis." [Emphasis ours.]

The emphasized portion of the rule just quoted covers the intangible elements to be considered in connection with the employment of the

teachers. It is the application of this part of the rule that caused the difficulty in this case.

[Training and Experience Differences]

It is conceded that some of the Negro teachers had a greater number of college credits than some of the white teachers, and it is likewise true that some of the plaintiffs had more years of experience in teaching than some of the white teachers who were employed.

There is ample expert testimony to the effect that the intangibles included in the Board's rule are important elements to be considered in determining teacher qualifications. This court recognized the importance of intangibles in *Morris v. Williams*, 8 Cir., 149 F.2d 703, where we held that intangibles may properly be considered in fixing teachers' salaries, and that differentials in salaries based upon valid intangibles are not violative of the Fourteenth Amendment. We stated (p. 708):

" * * * Teaching is an art; and while skill in its practice can not be acquired without knowledge and experience, excellence does not depend upon these two factors alone. The processes of education involve leadership, and the success of the teacher depends not alone upon college degrees and length of service but also upon aptitude and the ability to excite interest and to arouse enthusiasm. * * * "

As heretofore stated, the plaintiffs stipulated as to the validity of the rule. Their real complaint is that it was not honestly and fairly applied.

We shall briefly state the facts relative to the method used by the Board in employing teachers for the school year commencing in the fall of 1955.

[Employment Method Reviewed]

On April 11, 1955, Superintendent Henderson wrote each Board member a letter advising that the teaching staff should be reduced by eleven members. He set out in detail the training and experience of all the teachers, Negro and white, who were serving in the system. At a Board meeting on April 13, 1955, the qualifications of all the teachers of both races were discussed in the light of all of the elements of the Board's rule, including the intangibles. The Superintendent, upon the basis of the qualifications, recom-

mended the teachers to be reemployed. The eleven Negro teachers were not included in the group thus recommended. The Board at the same meeting also decided not to renew the contracts of four white teachers.

Superintendent Henderson testified at length at the trial, comparing the qualifications of the teachers reemployed with the Negro teachers on the basis of the whole rule of the Board. His testimony was corroborated as to elementary teachers by Mr. Brown who was supervisor of elementary teachers. Board members Wallace and Chamier testified that all teachers in the system were fairly considered for the positions available which they were qualified to teach; that the Board's whole rule, including intangibles, was considered in determining the qualifications; and that the Board, after a fair consideration of all the information before it, reemployed the teachers who in its judgment were best qualified. It is stipulated that the testimony of the remaining members of the Board if called would be similar to that of Mr. Chamier. All of the defendants' witnesses denied that race was considered in the selection of the teachers. There is no direct evidence of any race prejudice or discrimination on the part of any Board member or school official. The only thing bordering on direct evidence as to discrimination is the statement of Mrs. Tymony, one of the Negro teachers, to the effect that Superintendent Henderson told her that the time would come when teachers would be employed on the basis of qualifications only; and a statement by another teacher, Mrs. Harris, that Supervisor Brown told her no colored teachers would be employed in Moberly for at least five years. Mr. Henderson denied making the statement attributed to him by Mrs. Tymony, and Mr. Brown denied making the statement above set out to Mrs. Harris. This conflict in testimony raised the question of credibility of witnesses for the trial court. In any event it is doubtful whether these isolated statements are substantial evidence of discrimination. The Board was the body that did the hiring.

[Trial Court's Opinion]

The trial court in its unreported memorandum opinion [But see, 3 Race Rel. L. Rep. 660 (1958)] held that no racial discrimination was established, and that the Board had fairly applied its rule in determining the teachers to be employed. The court states in part:

"The testimony indicates that at this meeting the training, experience, personality and ability to fulfill the requirements of the position, including various intangibles, were discussed, and the testimony indicates that the Board's decision was based on its rule with respect to the employment of teachers. There is no testimony that there was any effort to get rid of the Negro teachers, either as individuals or as a group, because of race or color. The Board determined after a full and fair consideration of the matter that the white teachers in the system were better qualified than the Negro teachers and none of the Negro teachers were re-employed.

" * * * The individual qualifications, capabilities and abilities of each teacher must be considered, and human capabilities cannot be reduced to a mathematical formula. Intangible factors, such as personality, character, disposition, industry, adaptability, vitally affect the work of any teacher. The Superintendent's recommendation as to the various teachers was based upon information he obtained, his own observations, and observations of the principal and other teachers in responsible positions in the district. There was not the slightest inference in the testimony of these men that the race or color of any teacher entered into his recommendations. The court cannot substitute its judgment for that of the School Board or the Superintendent on the wisdom or expediency of a determination within the Board's jurisdiction, but must rather determine if there exists sufficient factual basis that the Superintendent and Board's actions were arbitrary and discriminatory with respect to the Negro teachers.

"The Superintendent in his testimony dealt specifically with each of the plaintiffs, comparing them with the teachers who were hired, and gave in detail his analysis on each.

"One's hindsight is often better than one's foresight, and while it does not enter into the decision in this matter, it is worthy of note that after the pupils in the system were integrated it was found that virtually without exception for the first half of the year

1955-56, the Negro pupils had trouble keeping up in their classes, but that during the second half of the year they were able to do so. It was the opinion of the Superintendent that this was due to the fact that they were not as well grounded in fundamentals as the white pupils with whom they were in classes. This fact supports the analysis of the plaintiffs by the Superintendent. * * *

"Under the testimony, the facts and circumstances shown in the evidence, the court finds that the plaintiffs have failed to sustain the burden placed upon them, and this applies equally to each plaintiff, that the defendants had a practice, policy, rule or regulation of not hiring duly qualified applicants of the Negro race to teach in the public schools, but the testimony on the other hand shows that the Negro teachers were given the same consideration as the white applicants in the hiring of teachers. There is no evidence or circumstance which indicates there was any discrimination by the defendants based solely on account of race or color."

[Statutory Notice Given]

The notice served upon the plaintiffs to the effect that their contracts would not be renewed was the notice contemplated by Section 163.090, V.A.M.S. Such statute reads in part:

" * * * It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. * * *

In interpreting this statute, the Supreme Court of Missouri in *Bergmann v. Board of Education*, 360 Mo. 644, 230 S.W.2d 714, holds that the statute does not change the legal effect of the teacher's contract, and does not "establish some sort of tenure." The court holds that the teacher's contract expires according to its terms, and that the notice contemplated by the statute can not be considered a discharge. Among other things the court states (230 S.W.2d at page 720):

" * * * Notice under the statute that the

teacher will not be re-employed for the succeeding year can not, therefore, be construed as a discharge or dismissal from employment, since the only written contract of employment is in no wise affected by the notice. * * *

"* * * On the admitted facts, plaintiffs Koerner and Prost had no contractual, preferential or statutory rights to continued employment. No contractual or statutory relationships were terminated by the notices. The existing contracts of employment were carried into effect, they were duly executed in all respects by the respective parties and they expired by lapse of time. There were no discharges, dismissals or termination of the employment of Koerner and Prost 'for unlawful reasons,' or in violation of constitutional rights, because there were no dismissals, discharges or terminations of employment by the defendants. * * *

[No Tenure Rights]

In the case we are considering, the employment contracts of the plaintiffs expired at the end of the 1954-1955 school year. Under Missouri law plaintiffs had no tenure rights. Plaintiffs' rights and obligations under their previously-existing contracts expired upon the termination of the contracts by lapse of time. A teacher upon expiration of his contract has neither contractual nor statutory rights to continued employment.

School boards are vested with wide discretion in matters affecting school management, including the employment of teachers, and a court may not interfere with the board's action unless the board has exercised its power in an unreasonable, arbitrary, capricious, or unlawful manner. *State ex rel. Wood v. Board of Education*, 357 Mo. 147, 206 S.W.2d 566; *Morris v. Williams*, D.C. E.D.Ark., 59 F.Supp. 508, 510; 78 C.J.S. Schools and School Districts § 128, pages 920-923.

Plaintiffs' theory is that the Board could not possibly have come up with the result of refusing reemployment to the eleven Negro teachers honestly and in good faith upon the basis that in each instance a white teacher had superior qualifications for a position to which the Negro teacher was eligible, and that an inference must be drawn from such result that the Board in its decision was influenced by discriminatory racial considerations.

We concede that the result is unusual and somewhat startling. In the usual situation, considering the number of applicants involved, one would suppose that a fair application of standards would result in the reemployment of some of the Negro teachers. However, we cannot say with certainty here that there was no substantial evidence to support the trial court's finding and conclusion that the Board acted honestly pursuant to its rule in awarding the teacher contracts.

[Witness Credibility Determination Respected]

This case was tried to the court without a jury. We are required to give great weight to witness credibility determinations by the trial court. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A.; *United States v. Oregon State Medical Society*, 343 U.S. 326, 329, 72 S.Ct. 690, 96 L.Ed. 978. In the case last cited the Court states (343 U.S. at page 339, 72 S.Ct. at page 698):

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746. * * *

In order to justify reversal in our present case we would have to determine that the trial court was not warranted in believing the positive testimony of Superintendent Henderson and the Board members to the effect that all applicants for teaching contracts were fully and fairly considered, pursuant to the Board's rule, and that no racial consideration entered into the matter of employment of teachers. Of course, the trial court was not compelled to believe this testimony, even though it was not directly disputed. On the other hand, the court, if convinced as to its truth, was not compelled to discredit it. The trial court had an opportunity to observe the witnesses as they testified and is in a far better position to determine questions of credibility of witnesses than this court upon the cold record. The trial court also had the opportunity to observe five of the plaintiffs on the witness stand and form some judgment with reference to the validity of the defendants' testimony with respect to the qualifications of such teachers.

[Racial Discrimination Not Proved]

We find no positive evidence that the Board was influenced by racial considerations in the matter of employing its teachers. Additionally, there are a number of factors tending to negative any racial prejudice on the part of the Board. The integration was completed promptly and in a manner satisfactory to all concerned. The wishes of the Negroes as to integration were fully considered and observed. Before integration the Negroes were paid salaries equal to those of the white teachers, and the Negro school was furnished with the same type of equipment and supplies as the white schools.

Each case of this type must be decided upon the basis of its own peculiar facts. We have carefully examined the entire record and find a mass of testimony tending to support the Board's determination that the white applicants' qualifications were superior to those of the Negro teachers with reference to the positions the Negro teachers were certificated to fill. The only evidence to the contrary on the qualifications issue was testimony by some of the Negro teachers in which they make some effort to compare their qualifications with those of the competing white teachers. In most instances the witnesses by their own testimony show that they were not familiar with the facts bearing upon the teaching skills of the competing teachers.

[Evidence Supports Board's Determinations]

Our examination of the record satisfies us that there is substantial evidence to support the

Board's determination as to teacher qualifications. The record discloses that experts in the field of education are not in agreement as to the best methods of evaluating teachers. Possibly, better methods might be available for evaluating teacher qualifications. The Board has a wide discretion in performing its duties, including those relating to the employment of teachers. If the Board acted honestly and fairly in the exercise of its discretionary powers, the plaintiffs are in no position to complain at least so long as the action of the Board is not unreasonable, arbitrary, or motivated by racial consideration.

Plaintiffs claim that they at least should have had preferred consideration for the three vacancies they were qualified to fill which arose by reason of the Board's refusal to reemploy four white teachers at the April 13 Board meeting. The Board's action declining to renew the contracts of the four white teachers took place at the same meeting that similar action was taken as to plaintiffs. The Board has a wide discretion as to the procedure to be followed in considering the renewal of contracts. The record shows that plaintiffs' applications were given full and fair consideration as to all vacancies which occurred on the teaching staff, which they were qualified to fill.

It is our conclusion that there is substantial evidence to support the trial court's determination that the plaintiffs have failed to meet the burden of proving that the Board's action in failing to renew their teaching contracts resulted from racial discrimination.

Affirmed.

CIVIL RIGHTS STATUTES State Action—Michigan

Elza J. WATSON v. Frank DEVLIN et al.

United States Court of Appeals, Sixth Circuit, May 19, 1959, 268 F.2d 211.

SUMMARY: A Michigan state prison inmate filed a suit for damages in federal district court, charging defendants with violating federal civil rights statutes by (1) conspiring to deny him equal protection of the laws through enticing him into the state and then falsely arresting and imprisoning him, (2) depriving him of due process of law by holding him incommunicado and without access to counsel during the period between arrest and arraignment, (3) arresting and maliciously prosecuting him without probable cause in violation of

the Fourth Amendment, and (4) creating and introducing in evidence at the trial false criminal records concerning him. Plaintiff's motion for leave to proceed in forma pauperis was denied on the ground that the proposed complaint was frivolous and without merit. The court held that federal criminal code sections invoked by petitioner did not give it jurisdiction of a civil suit; that the judgment of conviction was an absolute defense to the present contention that the arrest and imprisonment were false and a denial of equal protection of the laws; and that the proposed complaint failed to allege facts to support the necessary "showing of clear and intentional discrimination." It was further held that none of the facts alleged concerning the arrest, arraignment, and trial showed a deprivation of constitutional rights supporting a cause of action under civil rights statutes. 167 F.Supp. 638, 4 Race Rel. L. Rep. 93 (E.D. Mich. 1958). Subsequently, the plaintiff filed notice of appeal and moved for leave to appeal in forma pauperis, but the district court certified that the appeal was not taken in good faith and denied the motion. The Court of Appeals for the Sixth Circuit, while holding the district court's order to be a final appealable decision, affirmed it per curiam on the basis of the lower court's opinion.

CRIMINAL LAW

Conspiracy, Mayhem—Alabama

Grover McCULLOUGH v. STATE.

Court of Appeals of Alabama, May 12, 1959, 113 So.2d 905.

SUMMARY: In an appeal from a circuit court conviction of mayhem, for which appellant had received the maximum 20-year penitentiary term sentence, the Alabama Court of Appeals adopted the fact findings in a companion case, *Mabry v. State*, 110 So.2d 250, 4 Race Rel. L. Rep. 312 (Ala. App. 1959). In addition, the court noted (1) state's evidence tending to identify appellant as the one, among six white defendants, who had rendered the castration victim unconscious by a tire tool blow and that he remained with the group until the victim was abandoned, and (2) appellant's defense of alibi that, although he had participated in the plans to "grab a Negro" and in their execution until after the kidnapping, he left the group and went home before the tire tool blow and the castration were inflicted. The court held that this conflict in evidence was for the exclusive determination of the jury; that, even if appellant's evidence had been believed, he was at least an accessory before the fact; and that, by statute abolishing the distinction between principal and accessory in felony cases, he was equally guilty and subject to the punishment formerly prescribed for principals only. The court further held that charges requested by appellant, in effect making his guilt depend on a specific intent to castrate the victim as the overt act of the conspiracy, were properly refused, because a conspiracy to do an unlawful act, the execution of which renders it probable that a crime not specifically designated may result, renders each conspirator liable for everything proximately resulting. It was also held that, there being nothing to indicate pertinency, the state's objections were properly sustained to questions put by the defense on cross examination of an accomplice concerning whether he was or had been a member, or had attended a meeting, of the Alabama Council on Human Relations. The judgment was affirmed.

CRIMINAL LAW**Conspiracy, Murder—Illinois****PEOPLE of the State of Illinois v. Ronald RYBKA et al.**

Supreme Court of Illinois, March 20, 1959, 158 N.E.2d 17.

SUMMARY: Thirteen young men were convicted for the murder of a Negro high school student in Chicago. One Schwartz, granted a severance for trial, was convicted. Seven others who were tried jointly were convicted. Two of these were granted new trials but five were not. On writ of error by the latter five, the Illinois Supreme Court found that Schwartz had struck the fatal blow without provocation, it having been testified that he had first said, "I'll kill you, you black son-of-a-bitch," but that none of the plaintiffs in error had struck or threatened the victim. Plaintiffs in error contended that mere presence at the scene of the crime, or "negative acquiescence" in its commission, was not enough to convict them. But the court, finding that four of the five had left their earlier meeting place at which there was talk about "getting a Negro," knowing that an unlawful, violent assault was contemplated and that the fifth learned of it before the group came upon the victim, held that the jury was justified in concluding that there was more than mere presence and that the assailant had relied upon their support and encouragement. These conclusions were held sufficient to sustain their conviction as accessories before the fact of murder. But two of the five, who had left in a separate car, claimed that they decided to deviate from the course of the car carrying Schwartz and the others, in order to carry out a plan to find and "roll a well-dressed man"; they therefore argued that even if it be concluded that before the deviation they had encouraged Schwartz to commit a crime (which they denied) evidence showed that they withdrew from the common venture and communicated the fact of withdrawal to Schwartz. But the court found that the conclusion of the trial judge that there had been no effective withdrawal was justified by the facts that the latter two continued their search for the victim all had sought when they left their meeting place and that they made no attempt to dissuade Schwartz.

CRIMINAL LAW**Inciting to Riot—Tennessee****John KASPER v. STATE of Tennessee.**

Supreme Court of Tennessee, July 27, 1959.

SUMMARY: John Kasper was convicted by the Davidson County, Tennessee, Criminal Court, of inciting to riot in connection with disturbances that had occurred in Nashville in late summer, 1957, at the time Nashville's gradual school integration plan was put into effect. Error was brought to the Tennessee Supreme Court, which affirmed the judgment, overruling all assignments, which included contentions that: (1) the trial court erred in not sustaining motions to quash the array of jurors and for change of venue on the alleged grounds that the panel did not comprise a geographic or economic cross-section of the county and were strongly biased against the defendant; (2) the evidence preponderated against the verdict and in favor of defendant's innocence; and (3) the evidence failed to show (as would be

necessary to establish a riot) that as many as three people were assembled at any time, or that a riot ever occurred. In conclusion, the court stated that "any citizen has a right to express his opinion about the opinion of the Supreme Court in the integration cases but . . . when one goes beyond a proper expression of opinion and incites to riot he has gone beyond the area of free speech."

SWEPESTON, Justice.

Plaintiff in error, John Kasper, hereinafter called defendant, was convicted for inciting a riot and sentenced to serve for a period of six months in the Davidson County Workhouse and pay a fine of \$500.00.

There have been filed in behalf of defendant 20 assignments of error, some of which overlap, but counsel has not seen fit to file any written brief or argument in support of said assignments of error.

[Jury Array Challenged]

Under assignments 1, 3, 4 and 8 it is insisted that the court erred in not sustaining the motion to quash the array of jurors upon the alleged grounds that they did not comprise a cross section of the County either geographically or economically; that they were a biased and prejudiced panel of jurors holding strong opinions in opposition to defendant; in refusing to grant the motion for change of venue.

We have examined the record thoroughly in this regard and we find absolutely no merit whatever in these insinuations. The trial judge heard ample evidence in regard thereto and gave the same most careful attention. Hence we overrule those assignments.

[Status of Common Law]

The second assignment of error is that there is no common law offense of inciting to riot because it is alleged that the indictment or presentment is based on the common law and that the same has been expressly repealed by the adoption of the State and Federal Constitutions on those subjects and that no legislation covering the subject has been enacted.

There is no merit in this insistence because Art. XI, Sec. 1 of the Constitution of this State expressly provides otherwise and it has been so held in *Henley v. State*, 98 Tenn. 665, 41 S.W. 352, 39 L.R.A. 126.

Assignments 5, 6, and 7 are that the evidence preponderates against the verdict and in favor of his innocence; the proof fails to show that as

many as 3 people were assembled at any time as would be necessary to establish the existence of a riot; that the proof fails to show that a riot ever occurred, and if so, in the presence of the defendant.

[Evidence Summarized]

It thus becomes necessary to refer to the evidence. The State offered the following evidence:

The defendant, a native of New Jersey, and a graduate of Columbia University, Class of 1951, came to Nashville, Tennessee, about the end of July, 1957. At that time there was considerable feeling and unrest among a substantial number of residents of Nashville because of a Federal District Court order requiring the first grades in all City schools to be integrated upon the opening of the September 1957 term of school.

The defendant had appeared before the City School Board in an attempt to prevent integrating the first grade in the public schools. He began making speeches sometime in the early part of August around in various places. It was shown by the testimony of a Mr. Fullerton, a newspaper reporter for the Nashville Tennessean, that at a meeting on the first Sunday in August, 1957, the defendant said in substance, "Well, he said that people were getting pretty excited about it (the school opening) and he said, we don't want any trouble here but people are getting pretty excited. I remember he said, I had a fellow come up to me and say, 'John, why don't you hang the School Board.' He said, 'I don't say we should do that' and he said 'another fellow came up to me, John, I have got a shot gun, we might have to use it to defend myself and my family and I can do it.' He said, another fellow came up to me and said, 'John, I don't want to have any trouble here but my kids aren't going to school with Negroes, and if I have some dynamite, I know how to use it.'"

[Purports to Quote Others]

This witness stated that the defendant kept repeating the above statement in substance and that in all these references that he made to

violence he purported to be quoting somebody else and not saying these things himself.

This witness attended another meeting the latter part of the month of the same nature. The defendant continued speaking around in various places before the opening of schools on August 27 for enrollment of pupils. On one of those occasions he spoke in front of the Davidson County Courthouse and on that occasion he made extremely derogatory remarks about Governor Clement, Mayor West and other officials, including the School Board. He said the School Board had a Jew and negroes on it and they were nothing but pushbuttons for the Mayor. He referred to negro people generally as "niggers" and said the Jews were agitating and promoting this trouble with the negroes to the point where the negroes thought they were better than the people he was speaking to. He said the negro is better than the Jew and that the Jews were Christ killers. Again he said he was not advocating any violence but there would be bombings, dynamiting, bloodshed and probably killings but regardless, they were not going to put negroes in our schools. That statement brought on some loud talking and clapping of hands. On this occasion the defendant's hat was passed around among the crowd to take up a collection which defendant said was to defray the expense of printing literature and the money was turned over to him. The only literature passed out at the first meeting was announcement of the schedule of future meetings. At a subsequent meeting in the same spot, other literature to be referred to hereinafter was passed out.

[Appears at Schools]

On August 27, the enrollment date for the schools, the defendant appeared at at least five of the schools and made inquiry about the number of negro children registered, if any, and created a disturbance by urging the people not to let their children go into the schools or urging them to withdraw them as a result of which a very substantial number of children were withdrawn from each of the schools.

Then on September 9, the day the schools were to begin classes, the defendant engaged in the same performance. For instance, at the Caldwell School there were some people there before the defendant arrived and they were quiet. After he arrived and began speaking, the

crowd increased and became loud and traffic was blocked so that the police officer made him move on. Defendant in departing told the crowd to follow him to the Buena Vista School. Then at Fehr's School where defendant appeared on September 9, there were 156 pupils there before he came and only 40 afterwards. The mob yelled for the lady principal to come out and they threatened to get her. During the disturbance the colored janitor's automobile was burned. After the crowd had dispersed, the schoolyard was filled with sticks, stones and broken bottles.

[Principal's Testimony]

This principal definitely testified that part of the threats made against her were made while the defendant was talking to the crowd asking them to boycott and picket the schools. She named more than 4 people in the crowd.

Then that night of September 9, the big show came off. The meeting started out in front of the War Memorial Building in Nashville but as the crowd grew in size and were blocking traffic on Capitol Boulevard, the meeting was moved to the steps of the Capitol Building. The crowd was estimated to be in the beginning a little more than 100 but increased to the maximum estimate by some witnesses of 700. At this meeting the defendant spoke his usual line of stating what would happen if the integration was proceeded with but was careful, of course, not to make any statements or threats as to what he would do himself personally. He designated pickets to go to some of the schools; he held up a rope with a noose in the end of it and suggested that a lot of people would like to see Z. Alexander Looby hanged (this latter person being a negro lawyer and a member of the City Government of the City of Nashville). The defendant posed for a picture holding some wooden mallets crossed in his hands, these mallets being the type used by stonemasons.

["Last Days of Peace"]

At this meeting there was passed out with the name of the defendant on the reverse side of the same printed material that stated that these were the last days of peace between the white and negro races and tended to question the motive and sincerity of national, state and county officials and urged that the white people stiffen their backs and prevent the integration of schools with their shotguns. There was also passed out

by the defendant or those aiding him in the conduct of his meetings and speeches a picture of a negro boy kissing a white girl.

The evidence shows that the crowd reacted to these things as one would expect. Immediately thereafter, according to one witness, at least 150 people who had attended the meeting in front of the Capitol repaired to Fehr School where a riot occurred. The crowd was breaking glass and running all over everything.

[School Dynamited]

About two o'clock A. M. that same night, the Hattie Cotton School was dynamited and partly demolished.

We deem it unnecessary to go into further detail as we are of opinion that there is ample evidence both direct and circumstantial, to fully support the verdict of the jury. We would like, however, to make this comment. The defendant's insistence is that he does not believe in violence and has never at any time advocated violence; that he came here for the purpose of promoting friendly race relations. He admits the general tenor of statements attributed to him by numerous witnesses, but insists that he was simply quoting predictions by others.

As for his alleged non-violence attitude, it seems to be a case of the voice of Jacob and the hand of Esau. As for race relations, his every move was consistent with and conducive to nothing but disruptive race relations.

Evidently we must overrule these assignments.

[Examination Ruling Proper]

Assignments 10 and 14 relate to the refusal of the trial judge to permit counsel for defendant to cross-examine two witnesses relative to their being beaten by police officers and causing them to make statements. The State concedes that this was error but we do not think so under the circumstances of this case. These men did testify that they were beaten by the police and that they were afraid of the police but under questioning by the trial judge, they testified in the absence of the jury that regardless of their claim of having been beaten that what they had said in their statements and in their testimony was the truth. The trial judge was satisfied with their statements that they were telling the truth and he was very careful all through the trial not to get into side issues but to stick strictly to the charge in the indictment. We do not think that

this was error but even so, in view of all the mass of evidence otherwise, we agree with the State that it is harmless error.

[Constable's Testimony]

The same thing may be said of assignment 19 with reference to Constable Peek. That is, the trial judge was not interested in Peek's conversation with the defendant when he arrested him and sought to elicit from defendant a history of his views and theories about Communism, race relations, etc.

Assignments 9, 11 and 12 relate to matters introduced in evidence consisting of a baseball bat, a mallet, etc., found in the car of witness Crimmons after he had been attending the defendant's meetings and about a piece of wire; also a sound film taken of the meeting on the night of September 9 showing the crowd in front of the Capitol.

Crimmons had been associating with the defendant, driving him around and also taking orders from him about picketing. It was proper to put these items found in his car before the jury to let them decide whether they were relevant to the charge in the indictment. The film was also properly authenticated and introduced for whatever it was worth and that also was for the jury. There is some question about the type of wire, whether it was suitable for discharging dynamite, but that is likewise a matter that was for the jury so that we can see no merit in these assignments.

We have examined the other assignments and find no merit in them. There is no doubt in anybody's mind that any citizen has a right to express his opinion about the opinion of the Supreme Court of the United States in the integration cases but the right of free speech is limited just as are all other so-called rights and when one goes beyond a proper expression of opinion and incites to riot, he has gone beyond the area of freedom of speech. The great Justice Oliver Wendell Holmes said that no one has a right to yell "Fire" in a crowded theater when there is no fire.

[Judge Commended]

Before closing we wish to make the following comment. The trial judge made a preliminary statement to counsel that he would confine the evidence strictly to the charge in the indictment and there would not be tolerated any side issues.

He enforced this ruling strictly and impartially as well as humanly possible. It is well that he did for many reasons including the fact that approximately fifty witnesses testified.

The judge commended counsel for the effi-

ciency and propriety of their efforts. We most heartily commend the judge for his fairness and efficiency.

All assignments are overruled and the judgment below is affirmed.

ELECTIONS

Registration—Civil Rights Act

UNITED STATES of America v. STATE OF ALABAMA et al.

United States Court of Appeals, Fifth Circuit, June 16, 1959, No. 17684.

SUMMARY: The United States brought an action in federal court under Part IV of the Civil Rights Act of 1957 [2 Race Rel. L. Rep. 1011, 1013 (1957)] against the state of Alabama, the Board of Registrars of Macon County, and named individuals as members of the Board to have adjudged unconstitutional certain acts and practices of defendants, alleged to deprive persons of the right of United States citizens to vote without racial discrimination in elections held in Alabama, and to obtain a permanent injunction against defendants' further engaging in such activities. Defendants moved to dismiss. The two individuals argued that preventive relief should not be granted as against them because they had already in good faith absolutely resigned office after having turned over to the county sheriff, in response to a subpoena duces tecum, all the records sought by plaintiff in this case. The court held that the statutory language that "[R]egistrars may hold office for four years . . . and until their successors are appointed" did not indicate a legislative intent that registrars are obligated to serve until appointment of successors. It was also held that preventive relief was not available against the Board because it was a nonsuable legal entity and not a "person" within the Civil Rights Act, and that the Act does not authorize the United States Attorney General to bring actions for preventive relief against states. The action was therefore dismissed against all defendants. 171 F. Supp. 720, 4 Race Rel. L. Rep. 322 (M.D. Ala. 1959). [Note: see also *In re Wallace*, 170 F.Supp. 63, 4 Race Rel. L. Rep. 97 (M.D. Ala. 1959)]. On appeal, the Court of Appeals for the Fifth Circuit affirmed, holding that the district court could not assume jurisdiction over a state in a civil rights action in the absence of its conferment, specifically or by necessary implication, in a federal statute; that, as to the individual defendants, the "supposed need for someone to sue" could not obviate the general principle that jurisdiction over persons sued in a particular capacity is conditioned upon such persons having that capacity; and that the argument of necessity or desirability likewise could not support the proposition that the Board of Registrars, without members to be sued or served, constituted a legal entity subject to this suit. The court incidentally suggested resort to the remedy of action under state law to compel responsible authorities to fill the vacancies on the Board of Registrars.

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

HUTCHESON, Chief Judge.

This appeal tests for error the order of the district judge dismissing the complaint as to all

the defendants for the reasons stated in his opinion¹ as to each.

1. United States of America v. State of Alabama, et al., 171 F.Supp. 720.

This is the record. On February 5, 1959, the United States of America, appellant, filed an action against appellees Grady Rogers, E. P. Livingston, and the Registration Board of Macon County, Alabama. This action was brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S. Code, sec. 1971)² to obtain preventive relief against certain acts and practices which deprive citizens of their right to vote on account of race or color.

[Allegations of Complaint]

The complaint specifically alleged the following facts. The appellees, the Registration Board and Rogers and Livingston, sued as members, who, under Alabama law are responsible for registering qualified citizens for voting, have engaged in certain discriminatory acts and practices. Among those practices are the maintenance of separate and segregated registration facilities for negroes; the application of more stringent and more rigid registration standards to negroes than to whites; and various other acts and practices which clearly set forth denial of registration to vote solely on account of race or color. Such discriminatory acts and practices have brought about and perpetuated a great disparity between the respective percentages of white and negro citizens of voting age registered to vote in Macon County, Alabama, despite the fact that negro citizens of voting age in Macon County greatly outnumber white citizens of voting age.³

Appellees Rogers and Livingston, who are not before the court as individuals but only as members of the Board of Registration, resigned as

registrars of Macon County in Dec., 1958, some two months before this suit was filed. Their resignations were absolute and unconditional, and it was shown by affidavits, depositions and documents, that neither intended to serve again as a member of the Board of Registration, that their resignations had been accepted by the appointing board, and that each had accepted and qualified for another public office. The Registration Board, for the purpose of preventing negroes from registering, became inoperative during long periods of time from 1946 to present. The latest paralysis of that office occurred in December 1958 and was caused by the purported resignation of its only two members.

[Injunction Sought]

An injunction was sought to prevent the above named appellees from engaging in the alleged acts, practices, methods or procedures in whatever form, which discriminate against any applicant for registration for voting in Macon County, Alabama, on account of his race or color.

Subsequently on February 23, 1959, appellant amended the original complaint to include as a party defendant the State of Alabama. This amendment averred that the State of Alabama, through its agents, officials and agencies, had engaged in the discriminatory and unlawful practices specified in the complaint. The amendment sought a declaratory judgment of the illegality of these acts and practices and a judgment "enjoining Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court."

[Motions to Dismiss]

Appellees filed motions to dismiss.⁴ Essentially, appellee State of Alabama objected to the action on the ground that the Civil Rights Act of 1957 does not authorize suits against states but only individual "persons" and that the State is not a "person" within the meaning of the Act;

2. Sec. 1971(c). "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsec. (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

3. In 1958 white citizens of voting age numbered approximately 3100, whereas negro citizens of voting age numbered approximately 14,000. As of Dec. 1, 1958, white citizens registered to vote in Macon County numbered approximately 3,016, or approximately 97% of the white population of voting age; and the negro citizens registered to vote in Macon County numbered approximately 1100, or approximately 8% of the negro population of voting age. (Complaint, par. 8, 9, R. 3).

4. In addition to the motions to dismiss appellees filed several other motions including a motion to strike and quash service, an answer or objection to the motion to produce, and a motion to dissolve the temporary restraining order. The issues on these subsidiary motions were essentially the same as on the motions to dismiss.

that states have exclusive jurisdiction in the field of voting by virtue of the Tenth and Eleventh Amendments to the United States Constitution; that in any event the District Court has no jurisdiction over actions involving a state; and that the Civil Rights Act of 1957 is unconstitutional. Appellees Rogers, Livingston, and the Registration Board objected to the complaint on the ground that the suit was improperly brought against Rogers and Livingston because they had effectively resigned their office as registrars; that the Civil Rights Act of 1957 does not authorize suits against the Registration Board but only against individual persons; that the State of Alabama is an indispensable party; that the action is precluded by the Eleventh Amendment to the Constitution; and that the registration board was not a suable entity under the laws of the State of Alabama.

[Complaint Dismissed Below]

The court below dismissed the complaint as to all defendants. With respect to appellees Rogers and Livingston, it held that they could not be made defendants because their resignations were effective in all respects, and that under the applicable Alabama law registrars have no obligation to continue to serve until successors were appointed to fill that office. The court dismissed as to the Registration Board on the grounds that it was not a suable legal entity under Alabama law and that in any event the Civil Rights Act of 1957 does not authorize suit against such a board, but permits a suit only against individual persons as members of the Board.

The court held that the action would not lie against the State of Alabama, on the ground that the Civil Rights Act of 1957 did not authorize a suit against a state. Having held, for the reasons stated as to each, that none of the defendants were subject to the suit, the court entered a judgment dismissing it as to each.

Appealing therefrom, plaintiff-appellant is here urging against the judgment three specifications of error:

1. The District Court erred in holding that 42 U.S.C. 1917(c) does not permit the Attorney General to bring an action against the State of Alabama or the Board of Registrars of Macon County, Alabama.
2. The District Court erred in holding that an action under the Civil Rights Act of

1957 will not lie against registrars who have purported to resign their office, but for whom no successors have been appointed.

3. The District Court erred in holding that the Board of Registrars of Macon County, Alabama, is not a suable legal entity.

and seeking its reversal.

[Suiability of State]

Paramounting the first specification, that the court erred in holding that the statute upon which the suit was based does not permit the Attorney General to bring an action against the State of Alabama, appellant devotes the major portion of its brief to a discussion and argument which, not confining itself to an interpretation and construction of the statute, but, taking far wider range, undertakes to discuss not the actualities of the jurisdiction claimed to have been conferred by the statute but the possibilities in general of conferring upon the federal courts jurisdiction of an action against a state of the kind asserted here.

Interesting and engaging as these speculations are, we will not indulge in them, here, but, confining ourselves to the sole question for determination, whether the statute supports the jurisdiction asserted, we will state simply but categorically that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that, in providing "whenever any person, . . .", the congress intended to, or did, provide for suit against a sovereign state.

Without elaborating upon it, as under the settled law of the cases we could do in extenso, it is sufficient for us to simply say that, under the principle which has been, and still is, controlling upon the federal courts, whatever congress might or could do in providing in a civil rights action for conferring federal court jurisdiction over a state, it has never heretofore done so and it has not in terms done so in the statute invoked here.

[No Jurisdiction over State]

Absent such specific conferring of jurisdiction, a federal court would not, indeed could not assume jurisdiction over a sovereign state without a precedent determination that, though the juris-

diction had not been expressly conferred, the language of the invoked statute carried the necessary, the unavoidable implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer it.

Reading the statute as one will, such an implication cannot be found in it. For it cannot be reasonably contended that the congress intended in a situation of this kind, where both the complaint and the Alabama statutes themselves, of which we take judicial knowledge, plainly show, that no exception or objection is, or can be, made on any kind of constitutional grounds to the will of the state there expressed to confer or that there is any need for or justice in finding authority, under this statute to sue the state itself for the wrongs upon the statute, and upon it perpetrated by its allegedly unfaithful servants. Indeed, the gravamen of the complaint against the officers of the state who subvert and pervert the state's will, as expressed in its statutes,⁵ is that defendants Rogers and Livingston, "in the course of their official duties have discriminated against qualified negro citizens on account of their race or color, and a judgment is sought

declaring such past acts and practices to be illegal under the constitution and laws of the United States. Further an order is sought enjoining said defendants so long as they remain responsible for the duties of their office and their successors when appointed and qualified from engaging in such illegal acts and practices in the future."

[*Status of Resigned Registrars*]

We thus come to the second specification of error that, though, as the district judge expressly found, the two, sued as board members, had, some two months before the suit was brought, in good faith resigned their offices and each has taken another state office, they can and should be treated as still members of the board, to say of it that we think the short and simple answer to it is that the supposed need for someone to sue cannot be made, as appellant seeks to make it, to serve as a valid reason for rejecting out of hand the general principle, which underlies and conditions, existence and exercise of jurisdiction over a person sued in a particular capacity, that such person has that capacity.

In addition to pointing out, as the district judge did, that the remedy does not lie in perverting jurisdictional processes by means and to ends as injudicious as they are unjudicial, by holding one who is not an officer responsible as such, but that it lies in taking appropriate action under Alabama law to compel those authorized to, and responsible for, constituting and filling vacancies in the membership of the Board of Registrars to fill those offices, it is sufficient to say that these considerations aside, we are of the

5. In *Constantin v. Smith*, a suit against the governor of the States of Texas, 57 F(2) 227, affirmed in *Sterling, Governor of Texas v. Constantin*, 287 U.S. 378, the court thus clearly and correctly stated the principles controlling in civil rights suits such as this one:

"Upon the first proposition advanced, that this is a suit against the state, and that as such it may not be maintained the authorities overwhelm; that this is a suit under the first subdivision of Sec. 41, 28 U.S.C.A., Sec. 24, Subd. 1 of the Judicial Code, to redress the deprivation of property arising under the Constitution and laws of the United States (*Holt v. Indiana Mfg. Co.*, 176 U.S. 70). As such it is not a suit against the state, but against persons in their individual capacities, to prevent them from enforcing statutes in themselves unconstitutional, or unconstitutional as attempted to be enforced and applied. In such a suit, when it is found, that 'an individual, acting under the assumed authority of a state, as one of its officers, and under color of its, laws comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to import to him any immunity from responsibility to the supreme authority of the United States.' Ex parte *Ayers*, 123 U.S. 507; *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362; Ex parte *Young*, 209 U.S. 123; *Yick Wo v. Hopkins*, 118 U.S. 356; *Truax v. Raich*, 239 U.S. 33; *Greene v. Louisville & Int. R.R.*, 244 U.S. 507; *McMilan v. Comm.*, 51 F.2d 400; *McLeish v. Binford*, 52 F.2d 151. In this suit plaintiffs invoke the exercise of the judicial power of the United States which, vested by the Constitution in its

courts, extends to all cases of law and equity arising thereunder. * * *

"No exertion of this power rests on clearer or more certain grounds than that of its chancery jurisdiction. * * *

"Of the chancery jurisdiction no phase of it has a better settled basis, a more comprehensive and remedial scope than that which it employs to prevent persons, acting under the authority or color of state laws, from denying the due process and equal protection which the Fourteenth Amendment guarantees. This must necessarily be so, for, independent of each other in their respective spheres as are the state and federal governments, the Constitution of the United States is the supreme law of the land, and the courts of the United States, as the repositories of federal judicial power, are compelled to and will assert and vindicate its supremacy, to protect the rights of individuals menaced by personal aggression masked under official power. * * *

clear opinion that the reasons given by the district judge for rejecting this contention of plaintiff-appellant are sound, indeed unanswerable, and that we approve and adopt them.

[*Suability of Board*]

Of the third and final specification, that the Board of Registrars, without members to be sued or served, constituted a legal entity which must stand in judgment in this suit, we think we need do no more than say that no sound argument is presented or authorities cited against the decision reached and the judgment entered by the district judge. Indeed, no argument is presented in support of the action which the court below was asked, but refused, to take, that is to assume jurisdiction over a board without members, a jurisdiction which, for lack of process it did not and could not assert, except the same argument of Necessity or Desirability made in connection with the second specification. Putting to one side: that such an argument may not serve other than as a cautionary warning against too readily accepting an apparently wrong result as a right one; that it can never take the place of, or serve as real grounds for asserting, jurisdiction, to point out, as the district judge did, that the remedy lies not in trying to sue a memberless board but in a suit against the appointing officers of the state to require the appointment of members to the board, we think it beyond any doubt that there is no basis for the claim that, in ruling as he did, for the reasons that he gave, the district judge in any way erred.

[*District Court Opinion Approved*]

Stating: "It is the individuals on the Board and not the Board itself that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote, therefore, it is for the individual officers that preventive relief—here in the form of injunctions—must be obtained against," the district judge, citing *Handy Cafe, Inc. v. Justices*, 248 F.2d 485; *Hewitt v. City of Jackson*, 188 F.2d 423; and *Charleston v. City of Hialiah*, 188 F.2d 421, to which may be added *McSwan v. County Board*, 104 F.Supp. 861, *Gerald Graves v. City of Boliver*, 154 F.Supp. 625, correctly we think, appraised the legal situation arising on the facts and correctly denied the relief asked. In reaching this conclusion we have not overlooked or disregarded *Garner v. McCall* (Ala.), 178 So. 210 and *Boswell v. Bethea* (Ala.) 5 So.2d 816, cited by the appellant as requiring a contrary ruling. We think appellant's reliance on them will not at all do. Indeed, we think that the *Boswell* case which dealt with an appeal from a judgment of the Circuit Court in a suit against the Board of Registrars, composed of the three members, naming them, explicitly confirms the position of the district judge that, suing a board having no members is as inconceivable in law as suing, as members of a board, persons who are not such, and that under the facts established and found, the judgment must be affirmed.

AFFIRMED.

ELECTIONS

Registration—Louisiana

James SHARP, Jr. v. Mrs. Mae LUCKY, Registrar of Voters, Ouachita Parish.

United States Court of Appeals, Fifth Circuit, April 30, 1959, 266 F.2d 342.

SUMMARY: Plaintiff, a Negro attorney, brought an action for damages in federal district court against defendant as registrar of voters of Ouachita Parish, Louisiana. Plaintiff claimed that he had been injured professionally by a refusal of defendant to permit him to inspect a client's registration card in defendant's office for the stated reason that only white people

were waited on there, whereas the cards of Negroes whose registrations were challenged were kept in another room where defendant's assistant waited on members of that race. An injunction was also sought to bar segregation practices in the office of defendant and her successors. The court granted a motion to dismiss for lack of jurisdiction on the basis that the right to practice law is wholly a state-controlled privilege not involving federal civil rights. The other allegations of the complaint were held not to state a valid cause of action. 148 F.Supp. 8, 2 Race Rel. L. Rep. 431 (W.D. La. 1957). The Court of Appeals for the Fifth Circuit, however, reversed and remanded the case on the ground that the Louisiana parish could not validly operate a segregated registrar of voters office. 252 F.2d 910, 3 Race Rel. L. Rep. 241 (1958). [See also *Reddix v. Lucky*, 148 F.Supp. 108, 2 Race Rel. L. Rep. 426 (W.D. La. 1957), *rev'd* 152 F.2d 930, 3 Race Rel. L. Rep. 229 (5th Cir. 1958)]. Upon return of the case to the District Court, plaintiff abandoned his claim for damages based on alleged professional injuries and prayed only for a declaratory judgment and an injunction against defendant's segregation of the races in her office. After trial on the merits the court dismissed the suit, finding that the exceptional instances when separation of the races had occurred had been arranged in a good faith effort to provide service and that, even if a wrong had been done, the arrangement complained of had been voluntarily stopped before the suit was filed. 165 F.Supp. 405, 3 Race Rel. L. Rep. 984 (1958). On a second appeal, the Court of Appeals for the Fifth Circuit affirmed, upholding the district court's findings of facts and conclusions drawn therefrom, and ruling that extraordinary injunctive relief was properly denied where defendant had acted fairly, in good faith, and with good will.

PER CURIAM.

When this cause was here before on plaintiff's appeal from a judgment dismissing his suit on the pleadings,¹ this court, one judge dissenting, reversed the judgment and remanded the cause for further proceedings not inconsistent with the opinion.²

The district judge, after a full hearing on the merits and upon detailed findings,³ rejected plaintiff's claims as without substantial basis, denied the injunctive relief sought and dismissed the suit, and plaintiff is here insisting that the fact findings are clearly erroneous and the judgment may not stand.

We do not think so. Quite to the contrary, we are of the opinion that the record furnishes

full support for the findings of fact and conclusions drawn therefrom by the district judge, and that the granting of the extraordinary relief asked would have been an improvident exercise of a power which should be used sparingly, cautiously and only, as was not the case here, where both the right and the wrong claimed are clear and the necessity for the extraordinary relief of injunction is equally clear.

Indeed, we are of the opinion that the issuance, on this minuscule claim, of an injunction against the defendant would have been to tithe mint, anise and cummin, and to overlook the weightier matters controlling here, the fair and just administration by the registrar of the duties of her office, in good faith, with good manners, and with good will.

The judgment is affirmed.

JOHN R. BROWN, Circuit Judge, concurs in the result.

1. *Sharp v. Lucky*, D.C., 148 F.Supp. 8.

2. *Sharp v. Lucky* 5 Cir., 252 F.2d 910.

3. *Sharp v. Lucky*, D.C. 165 F. Supp. 405.

EMPLOYMENT

Fair Employment Laws—New York

In the Matter of the Application of the AMERICAN JEWISH CONGRESS, a membership corporation, For an Order Pursuant to Article 78 of the Civil Practice Act, against Elmer A. CARTER, et al., constituting the State Commission Against Discrimination, and Arabian American Oil Company, a Delaware Corporation.

Supreme Court of the State of New York, New York County, Special Term, Part I, July 15, 1959.

SUMMARY: The American Jewish Congress in August, 1956, filed a complaint with the New York State Commission Against Discrimination (SCAD) against the Arabian American Oil Company (Aramco), a Delaware corporation doing business in New York, charging a violation of the state Law Against Discrimination, Section 296.1(a), by refusing to hire Jewish applicants for employment, and Section 296.1(c), by making preemployment inquiries as to the religion of persons applying for employment. The Investigating Commissioner found that Aramco conducted all of its oil-producing operations in Saudi Arabia under an agreement with that country which provided that applicants to be employed there would be screened and selected in accordance with Saudi-Arabian law which forbids Jews to reside, travel, or work within the territorial limits of that state. After intimations from the United States Department of State that any assault on terms of this agreement might adversely affect negotiations in progress between the United States and Saudi Arabia concerning delicately balanced relationships, SCAD had in 1950 granted to Aramco a "bona fide occupational qualification," which the company had since used as a basis for inquiries about applicants' religion. Having ascertained from State Department officials that relations between the two countries had not appreciably changed since 1950, the Commissioner in November, 1958, dismissed the complaint, insofar as it charged a violation of Section 296.1(c), on the ground that Aramco was entitled to a continued grant of the qualification; but he stated that complainant could apply for reopening the case upon an appreciable change in the American-Saudi Arabian relationships which originally prompted the qualification. The complaint, insofar as it charged a violation of Section 296.1(a), was dismissed on the ground that complainant was not a "person claiming to be aggrieved." Complainant then petitioned the New York Supreme Court to annul the determinations of the Investigating Commissioner. The court denied a motion to dismiss on the grounds that complainant lacked status as a "person aggrieved," in view of SCAD's having accepted jurisdiction; and it annulled the determinations, holding that there was no statutory authority to grant an occupational qualification on the basis of an applicant's religion except where failure to permit inquiry might interfere with the functions of a religious organization. The court observed that just as no treaty or statute impairing the freedom of a group because of religious affiliation could stand against the First and Fifth Amendments, the Commissioner's determinations based merely on a private contract could not stand above the law and policy of the state protected by the Tenth Amendment. The Investigating Commissioner's determination, the Supreme Court's ruling on the motion to dismiss, and the order annulling the determination follow.

Determination After Investigation and Conference

On the 1st day of August 1956, the American Jewish Congress, 15 East 84th Street, New York, New York, transmitted to the Chairman of the Commission Against Discrimination a verified complaint against the Arabian American Oil Company, 505 Park Avenue, New York, New

York, which it charged with violation of the Law Against Discrimination.

The American Jewish Congress in its complaint states:

The Complainant, AMERICAN JEWISH CONGRESS, by its attorney, WILL MAS-

LOW, complaining of the Respondent to the State Commission Against Discrimination, states:

FIRST: That at all times herein mentioned the Complainant has been and is a membership corporation duly organized under and existing by virtue of the laws of the State of New York and maintaining its principal office at 15 East 84th Street in the County and City of New York.

SECOND: That the purposes of the Complainant, as set forth in its Certificate of Incorporation, include:

"(a) To safeguard the civil, political, economic and religious rights of the Jews in all countries;

• • •

(e) To secure and maintain equality of opportunity for Jews everywhere and, in every lawful manner, to secure effective remedies, assistance and redress in all cases of injustice, hardship, or suffering arising out of discriminatory measures or practices against Jews, or from the violation or denial of their lawful rights."

That by reason of the foregoing, and the unlawful discriminatory practices herein-after set forth, the Complainant is a "person claiming to be aggrieved" by such unlawful practices, within the meaning of Section 297 of the Executive Law of the State of New York.

THIRD: That on information and belief the Respondent is a New York corporation, existing by virtue of the laws of the State of New York.

FOURTH: That as part of the regular operation of its business the Respondent maintains a recruiting and employment office in the City of New York through which it solicits and hires personnel for employment in connection with the operation of Respondent's business both in this country, in Saudi Arabia and in other foreign countries.

FIFTH: That in the May 24, 1956 issue of the publication known as Engineering News-Record, published in the City of New

York and distributed throughout the City of New York and the State of New York as well as throughout the United States, Respondent caused to be inserted help-wanted advertisements inviting applicants to apply at Respondent's employment and recruiting offices located at 505 Park Avenue, New York City, for positions with Respondent for work on Respondent's projects situated in New York as well as in other parts of the United States and in various foreign countries. These advertisements, annexed hereto as Exhibits A, B and C, invite application for employment as industrial, chemical, mechanical, electrical and automotive engineers and mechanical equipment specialists.

SIXTH: That, although these advertisements contain no explicit reference as to race or religion, on information and belief the Complainant charges that the Respondent does in fact refuse to accept for employment for any position, including those advertised in Exhibits A, B and C annexed hereto, any applicants who are of Jewish religious affiliation or ancestry.

SEVENTH: That on information and belief, Respondent, in the course of interviewing and selecting applicants for employment, by direct questioning and otherwise attempts to determine whether such applicants are Jewish.

EIGHTH: That by such inquiries and by direct and indirect specifications of the applicants' religious affiliations, Respondent has engaged in and is engaging in unlawful employment practices as defined by Sec. 296 (1) (c) of the Executive Law of the State of New York.

NINTH: That by thus restricting employment for religious reasons, by refusing to hire or employ Jewish personnel, Respondent has engaged in and is engaging in unlawful employment practices as defined by Sec. 296 (1) (a) of the Executive Law of the State of New York.

TENTH: That no action, criminal or civil, based upon the grievances set forth herein has been commenced by the Complainant.

WHEREFORE, the Complainant requests that the State Commission Against Discrimi-

nation make investigation of the foregoing Complaint and take such other and further action as is provided by Sec. 295 of the Executive Law of the State of New York.

[Investigator Designated]

After the filing of the complaint, the Chairman of the Commission designated me as the investigating commissioner to direct an investigation into the allegations of the complaint. Pursuant to Section 297 of the Law Against Discrimination, an investigation of this complaint has been made.

Much of the basic information as to personnel practices, hiring policy and pattern of employment has been assembled in prior cases and has not substantially changed. (Tyler vs. Arabian American Oil Company, (Case No. C-2405-49); Daytree vs. International Placement Agency, (Case No. C-2438-55); Daytree vs. Arabian American Oil Company, (Case No. C-2451-50); Shade vs. Arabian American Oil Company, (Case No. C-3171-52).

Respondent Arabian American Oil Company is incorporated in the State of Delaware and is duly authorized to do business in the State of New York. Respondent "conducts oil producing and refining, transporting and shipping operations within the sovereign state of Saudi Arabia under an agreement... whereby in exchange of exclusive rights to explore, drill, produce, transport and export oil in a definite area, Aramco, the respondent, shares equally with the Saudi Arabian government the profits from the enterprise." Although an American corporation, the locus of its total operation is Saudi Arabia and in all respects the operation is governed by the laws, decrees, and rulings of the King of Arabia, Ibn Saud, absolute ruler of that kingdom and his successor, King Saud.

[Recruitment in New York]

Personnel for this enterprise is largely recruited at the offices of the respondent in the City of New York, although there has been some recruitment and assignment of personnel to the offices at The Hague. By letter dated October 9, 1956, counsel for respondent informed me, in part, as follows:

"The New York Office has no operating mission. It functions only as a service organization for the Saudi Arabian operations.

"In its function as a service organization, the principal activities of the New York Office include liaison with the United States Government, recruiting of American personnel for work in Saudi Arabia, and administrative and medical services for such personnel, purchasing of equipment and technical services which cannot be procured abroad, and related engineering, accounting, transportation, communications, financial and legal activities."

The agreement between the Saudi Arabian government and respondent company provides that respondent shall screen and select applicants to be employed in Saudi Arabia in conformity with Saudi-Arabian law. The recruitment method and procedures utilized by respondent have been based on this agreement.

[Moved to Dhahran]

Because of unsettled conditions in the Middle East, some of the top administrative offices of respondent have been moved to Dhahran, Saudi Arabia. At Dhahran, by agreement with the Saudi Arabia government, the United States maintains an airfield and base.

The complainant, in a brief filed with the Commission contends that as a membership corporation duly organized under the laws of the State of New York, it has the right to file the instant complaint as a person claiming to be aggrieved by unlawful discriminatory practices. Respondent, although not submitting a brief, denies that the Law accords the complainant this right.

Section 297 of the Law Against Discrimination provides in part:

"Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The industrial commissioner or attorney-general may, in like manner, make, sign and file such complaint."

The question of complainant being a person claiming to be aggrieved was presented in American Jewish Congress vs. John Warren Hill, Presiding Justice of the Domestic Relations Court of the City of New York, et al (Case No. C-3734-55). There, Commissioner J. Edward Conway held that with respect to a charge of unlawful discriminatory practice falling under Section 296.1 (a) of the Law, complainant herein was not a person claiming to be aggrieved, but as to a charge falling under Section 296.1 (c) of the Law, complainant was a person claiming to be aggrieved. I concur with the reasoning of Commissioner Conway in the Hill case.

[Both Types of Charges]

In the instant case, complainant alleges both types of charges, i.e. complainant charges that by refusing to hire or employ Jewish personnel respondent engages in unlawful discriminatory practices in violation of Section 296.1 (a) of the Law; and complainant further charges that, in the course of interviewing and selecting applicants for employment, respondent directly and indirectly makes inquiries and specifications as to the religious faith of applicants and thus violates Section 296.1 (c) of the Law.

I hold that, with respect to its charge under Section 296.1 (a) of the Law, complainant is not a person claiming to be aggrieved. If the complainant, American Jewish Congress, of its own knowledge knows of applicants for employment who have been refused employment by respondent by reason of their religion, then recourse might be had to the filing of verified complaints by these individuals as provided for under the Law.

With respect to its charge under Section 296.1 of the Law, I hold that complainant is a person claiming to be aggrieved by unlawful discriminatory practices and that this portion of the complaint may be entertained by the Commission. This ruling is in accord with prior rulings of the Commission starting in 1946 with American Jewish Congress vs. American Lumberman's Casualty Company of Illinois (Case No. 1189-45).

[Clippings Submitted]

In support of its charge of violation of Section 296.1 (c), the complainant has submitted advertising clippings which respondent has had in-

serted in the May 24, 1956 issue of the publication known as *Engineering News-Record*:

"AUTOMOTIVE ENGINEER

Foreign Employment

Recent graduate with limited or no experience. For company's training program in Saudi Arabia. Salary commensurate with education and experience. Write outlining personal history and work experience.

Recruiting Supervisor, Box 137

ARABIAN AMERICAN OIL COMPANY
505 Park Avenue, New York 22, N. Y."

"MECHANICAL EQUIPMENT SPECIALIST

Graduate Mechanical Engineer with a minimum of 7 years experience in the selection, design, operation and maintenance of heavy industrial mechanical equipment. This includes Diesel engines, compressors, pumps, turbines, and other related machinery for oil refinery, power plants and oil producing facilities. Good industrial contacts required for New York Engineering Department, but job requires occasional travel to Europe and Middle East.

Salary commensurate with experience and training. Liberal benefit program. Write outlining personal history and work experience.

Recruiting Supervisor, Box 112

ARABIAN AMERICAN OIL COMPANY
505 Park Avenue
New York 22, N. Y."

Section 296.1 (c) of the Law Against Discrimination reads as follows:

"It shall be an unlawful discriminatory practice for any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color or national origin, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification."

Nothing in these advertisements submitted by complainant, directly or indirectly, serves to limit employment on the basis of race, creed, color or national origin, a fact which complainant concedes. I find that the evidence submitted in the

form of advertisements clipped from publications is in itself insufficient to support a finding of probable cause to credit the allegations of the complaint.

But the case at issue does not require supporting proof of complainant's allegations. Respondent does not deny that in the recruitment and selection of applicants for employment every effort is made to ascertain the religious heritage and affiliation of the applicant with the view of excluding from consideration those who cannot in any case secure a visa to enter Saudi Arabia by virtue of Saudi Arabian law.

[Recruitment Explained]

The method of recruitment has been outlined in a letter from respondent to former Commissioner Pinto in the case of William B. Shade vs. Arabian American Oil Company (Case No. C-3171-52):

"It is a condition for employment with Arabian American Oil Company and its associated countries that prospective domestic employees be qualified to enter the Kingdom of Saudi Arabia and that they be willing to serve in Saudi Arabia as required. This condition applies to all positions with the exception of certain minor clerical and stenographic positions. In the case of an applicant for a position where it is not contemplated that the employee will have occasion to go to Saudi Arabia, but can still be accepted for domestic employment, eligibility for issuance of a Saudi Arab visa is not a factor. No applicant for domestic employment is requested to fill out a visa for entry into Saudi Arabia.

"Inasmuch as a person's religion can bar him from entry into Saudi Arabia, it is necessary in determining an applicant's availability and qualifications for entrance into Saudi Arabia that it be determined initially whether or not the applicant's religion would preclude entry into Saudi Arabia. In those cases where it is necessary to know whether the applicant can qualify for a Saudi Arab visa, it is possible to learn whether he belongs to the Jewish religion from information volunteered by the applicant or through check of references, past employment histories, etc. Direct questioning of the applicant on this point is avoided."

The application for visa to enter Saudi Arabia is processed in respondent's office.

Such procedure would appear to be contrary to the provisions of the New York Law Against Discrimination and the rulings of the Commission. Selection of personnel by this method under ordinary circumstances would not be countenanced by the Commission and could only be pursued by a ruling granting the prospective employer a bona fide occupational qualification. In this case respondent maintains that the employment procedure is dictated by extraordinary circumstances over which it has little control. Respondent's argument revolves around the unique position in which it finds itself in its operations in Saudi Arabia. The right to determine whom it shall admit for work, for pleasure, for travel is the prerogative of a sovereign state. Saudi Arabia has chosen to assert this right by strict rule and regulation and decree that no Jew shall be permitted to reside, travel, work within the territorial limits of that state. To give this decree its maximum effectiveness, it has been required of respondent that in the exploitation of the petroleum resources of Saudi Arabia it shall carry out this policy in the recruitment of its personnel as one of the essential terms of agreement. This agreement is in the form of an unwritten understanding which respondent deems to be binding on its operations. Failure to fulfill the obligation of this agreement, according to the respondent, would constitute a serious breach of the contract and threaten the future of the whole enterprise and, thereby, endanger the oil supply upon which the economy of Europe and a significant portion of the world depends.

[Jewish Congress' Position]

It is the position of the complainant, the American Jewish Congress, that the laws, decrees, rulings of the Saudi Arabian government cannot be permitted to extend to the State of New York and a practice so blatantly contrary to the rulings of the State Commission as to pre-employment inquiries must not be tolerated by the Commission Against Discrimination.

The Commission Against Discrimination was first confronted with this question on February 17, 1950 in a complaint filed by an individual against the same respondent in which he charged respondent with making an inquiry in connection with prospective employment which

pertained to his place of birth and religion, in violation of the Law Against Discrimination. (*Daytree vs. Arabian American Oil Company*, Case No. C-2451-50). The interrogation in question was on the employment questionnaire form and at the instance of the investigating commissioner this and other improper interrogations were eliminated from the form by the respondent. The visa application and the questionnaire of respondent are filled out approximately at the same time by the applicant for employment. Because a Jewish person cannot enter Saudi Arabia, respondent's screening operation is designed to ascertain the religious faith of the applicant since a person of the Jewish faith cannot receive an entry visa. Respondent has maintained that every attempt is made to avoid the direct question, but if deemed necessary resort would be had to direct interrogation.

[Qualification Voted in 1950]

The right of respondent to ascertain the religious faith of the applicant by interrogation as to religion was resolved by resolution of the Commission, which voted in 1950 to grant to the respondent a bona fide occupational qualification which served to permit respondent to make the inquiries in question.

The action of the Commission in granting the respondent a bona fide occupational qualification came after certain informal intimations from the United States Department of State to the effect that relationships between the United States and Saudi Arabia were in a delicate balance and negotiations were at that time in progress between the United States and Saudi Arabia which were of tremendous import to the peace and stability of the Middle East and by implication that any assault on the terms of the agreement between Saudi Arabia and the respondent might affect these negotiations.

The primary objective of the present complaint is the abrogation of this resolution and the withdrawal of the bona fide occupational qualification granted by the Commission. It is the position of the complainant that if there appeared to be justification for this action of the Commission in 1950, which the complainant vigorously denies, the justification no longer exists since our government, in a resolution unanimously adopted by the Senate, has reaffirmed an historic policy of equality of treatment of all its citizens. The Senate resolution, called the Lehman Resolution, is herein quoted:

"Whereas the protection of the integrity of United States citizenship and of the proper rights of United States citizens in their pursuit of lawful trade, travel, and other activities abroad is a principle of United States sovereignty; and

Whereas it is a primary principle of our Nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinctions among our citizens in the granting of personal or commercial access or any other rights otherwise available to United States citizens generally is consistent with our principles; Now, therefore, be it RESOLVED, that it is the sense of the Senate that it regards any such distinctions directed against United States citizens as incompatible with the relations that should exist among friendly nations, and that in all negotiations between the United States and any foreign state every reasonable effort should be made to maintain this principle."

The problem of American-Saudi Arabian relationship has been a vexatious one assuming increasingly portentous aspects by reason of the great petroleum resources of the Arabian peninsula and their importance to the economy of Europe. What the stakes of diplomacy in the Middle East are might be gauged by the fact that the United States was able, after prolonged negotiations, to establish a great air base at Dhahran, Saudi Arabia, as a vital link in the arc of defense of the free world. These negotiations were carried on largely by the State Department and King Ibn Saud, absolute ruler of Saudi Arabia and his successor, whom the Secretary of State has described as "the anchor" of our Middle Eastern policy. (*New York Herald Tribune*, March 26, 1958, "Revolution in Riyadh" by Joseph and Stewart Alsop).

[Expression of Ideal]

There can be no question that the Senate resolution was an expression of the American ideal. This resolution was in accordance with the traditions of our country. It is not, however, a repudiation of this principle if its attainment cannot be immediately realized. The Department of State has not been unmindful of the contra-

dictions which have existed in the practical application of this principle. Directing his attention to the problem herein presented, John Foster Dulles, Secretary of State, in a letter, dated August 14, 1956, addressed to Mr. Philip M. Klutznick, President of B'nai B'rith, 113-year old Jewish service organization, stated that the resolution "... has offered the Department of State the opportunity to continue its efforts to impress on the Arab states the sentiments of this country." The Secretary of State gave assurance of "formal diplomatic action" in an effort to curb the Arab nation's restrictions on American citizens of the Jewish faith. It can be assumed that the State Department is cognizant of the conditions which presently prevail. Despite its efforts, there has been no relaxation of the restrictions insofar as has been ascertained. The barriers against the admission of Jews as members of the U.S. armed forces, as employees, as travelers en route to and through the Arabian states have not been lifted.

I do not consider the situation treated by a former chairman of the Commission, Edward W. Edwards, in a letter to the Secretary of the Army as published in the 1952 annual report of the Commission to be analogous to the instant case since there had been no intimation that the foreign policy of the United States was in any way affected. It should be noted that this letter, upon which the complainant in part relies, states that:

"... this Commission has given thought to the desirability of advising recruiting personnel and contractors doing government work in Arabian countries, that the necessity of obtaining a visa does not warrant pre-employment inquiries regarding religion of applicants for employment nor justify avoidance of the New York labor market."

The Commission did give considerable thought to this matter as above stated, but that thinking did not eventuate in any action to rescind the bona fide occupational qualification granted to the respondent.

[Confers With Officials]

Before finally making a determination in this matter, I have conferred in person with officials of the State Department at Washington, D.C. and have sought to ascertain the present relationship which exists between Saudi Arabia and

our government. The answer has been that the situation in regard to the relationship between the United States and Saudi Arabia which prompted the Commission's action in granting respondent a bona fide occupational qualification in 1950 has not appreciably changed.

By letter, dated September 23, 1957, the Assistant Secretary, Near East, South Asian and African Affairs of the United States Department of State advised me, in part, as follows:

"Any finding by the Commission which would compel Aramco to employ persons of the Jewish faith in Saudi Arabia could hardly be made effective in view of the known attitude of the Saudi Government. Efforts by Aramco to implement such a finding would most certainly prejudice the Company's operations in that country and would probably adversely affect other United States interests there as well. The Department has long been aware of the difficult problem presented by the reluctance of the Saudi Government to permit individuals of the Jewish faith, regardless of nationality, to enter Saudi Arabia. The Department has on appropriate occasions made representations to the Saudi Government regarding this problem but continuing tensions in the area, largely resulting from the Arab-Israel conflict, have so far prevented any improvement in the Saudi attitude. This Government will continue to seek an improvement in this situation as opportunities to do so arise. In the meantime, any immediate change in current Saudi Arabian policies on this issue would not appear likely."

Cognizant of the continuing efforts of the United States Department of State, there appeared to be the possibility that a reasonable time might witness an easing of the tensions and, therefore, a change in the situation in this troubled area. Such a possibility I deem now to be remote in the light of a letter dated October 6, 1958 from Mr. William M. Rountree, Assistant Secretary of the United States Department of State. The letter reads:

"With reference to your letter of September 30, 1958, there has been no change in the situation in Saudi Arabia as it was outlined to you in our letter of September 23, 1957.

"You may be certain that we continue to be

aware of the difficult problem presented by the reluctance of the Saudi Arabian Government to permit individuals of the Jewish faith, regardless of nationality, to enter Saudi Arabia. We will continue to follow this matter closely in the hope that opportunities may arise which would serve to bring about an improvement in the situation. No immediate change in the current policy of the Saudi Arabian Government appears likely, however."

[Qualification Continued]

Under these circumstances, I am constrained to continue the bona fide occupational qualification accorded by the Commission to the respondent in 1950. I, therefore, grant respondent a bona fide occupational qualification under the conditions that interrogations as to religion shall be confined to those whose employment requires an entry visa to Saudi Arabia or passage through countries en route which restrict visas on religious grounds.

In view of the foregoing:

1. The complaint, insofar as it charges respondent with unlawful discriminatory practices under Section 296.1 (a) of the Law, is hereby dismissed on the ground that complainant is not a person claiming to be aggrieved of such unlawful discriminatory practices; and

2. The complaint, insofar as it charges respondent with unlawful discriminatory practices

under Section 296.1 (c) of the Law, is hereby dismissed on the ground that respondent is entitled to a bona fide occupational qualification with respect to the inquiry as to religion made of applicants whose employment requires an entry visa to Saudi Arabia or passage through countries en route which restrict visas on religious grounds, and I, therefore, find that no probable cause exists to credit the allegations of that portion of the complaint.

However, in the exercise of my discretion, I am closing this case with the specific reservation that complainant may apply for reopening at any time upon sufficient evidence that the situation in regard to the relationship between the United States and Saudi Arabia, which prompted the granting of a bona fide occupational qualification, has appreciably changed.

In accordance with Rule 4 of the Rules Governing Practice and Procedure Before the State Commission Against Discrimination, the complainant has the right to apply to the Chairman of the Commission for a reconsideration of this determination. If such application is made, it must be in writing, state specifically the grounds upon which it is based, and must be filed within 15 days from the date of mailing of this notice of disposition in the office of the Commission where the complaint was previously filed.

Dated: November 10, 1958

Elmer A. Carter
Investigating Commissioner

Ruling on Aramco's Motion to Dismiss

SUPREME COURT, NEW YORK COUNTY
SPECIAL TERM, PART I
EPSTEIN, J.

This motion to dismiss the instant proceeding on the grounds that petitioner lacks status under the State Executive Law, Art. 15, Sections 296 (1) (a) and 296 (1) (c) and that this court is without jurisdiction, is denied. Respondent Commission accepted jurisdiction under Section 297 subdivision 2 and Section 298 of the said law. Petitioner was held to be a "person aggrieved" and a reasonably liberal application of such language has been sustained in other courts

as well as in this state: American Jewish Congress v. American Lumbermen's Casualty Company of Illinois (case No. 1189-45, Record, p. 6, item 46); N.A.A.C.P. v. Alabama, 357 U.S. 449; Pierce v. Society of Sisters, 268 U.S. 510; Upham v. Wyman, 27 Law Week, 4394, June 8, 1959. Petitioner here has a vital interest, shared with the people of the United States. It is to protect citizens of the United States and particularly of the State of New York, from the destruction of their basic rights at the instance of a foreign government, seeking to obscure our statutory and constitutional provisions with a perceptible film of oil.

Order Annulling Determination

EPSTEIN, J.

This is an application for an order under article 78 of the Civil Practice Act to annul the determinations of November 10, 1958 and March 26, 1959, by Commissioner Elmer A. Carter of the State Commission Against Discrimination and to direct said Commission to take appropriate action to credit the charges of the complaint in *American Jewish Congress v. Arabian American Oil Company* (Case No. C-4296-56). Petitioner charged Arabian American Oil Company ("Aramco") with violation of section 296, subdivision (1)(a) and (1)(c) of the Executive Law of New York State, known as the Law Against Discrimination. Petitioner is recognized by the Commission as coming within the reasonable scope of a "person" authorized to register a complaint under section 296, subdivision (1)(c). Adhering to his prior determinations, Respondent Carter on March 26, 1959 dismissed the petition of the American Jewish Congress relative to its charges of Aramco's violations of both spirit and letter of the State's anti-discrimination law. Respondent Commission voted to permit Aramco to inquire into the religion of job applicants as a "bona fide occupational qualification" and further to authorize Aramco to have applicants for employment fill out a visa application for travel in Saudi Arabia containing an inquiry into the applicant's religion. Commissioner Caroline Simon, now Secretary of State of New York, dissented, stating forthrightly that "our basic documents of freedom *** are never to be subordinated to immediate business gain." Her position was that there was no State Department policy which would dictate the subversion of this salutary New York State law to an internal policy of Saudi Arabia motivated by Arab hatred of Israel.

Under date of June 15, 1959, Assistant Secretary of State William B. Macomber wrote to United States Senator E. L. Bartlett of Alaska regarding this very issue:

"We assure you that the Department does not intend to inject itself in any way into the proceedings of a State court; at the same time, the Department does have an obligation, when requested to do so, to provide State authorities with information respecting the policies of other Governments and of our own in foreign lands."

[No Authority for Qualification]

There is not the slightest doubt that nowhere in the history and origin of the statute under consideration is there the slightest authority for the determination by respondent that the religion of an applicant for employment is or can ever be regarded as a "bona fide occupational qualification." Any such holding would undermine the very foundation of our American concept of liberty and the constitutional safeguards of that liberty. The only cases where such inquiry is upheld are those where failure to permit such might interfere with the functioning of a religious organization (see remarks of Hon. Charles Tuttle in Hearings, pp. 349, 350, 670). Respondent Commission has refused to permit a help-wanted advertisement calling for a "colored worker" on the asserted ground that color was a "bona fide occupational qualification for a position as a social worker" (Report on Progress, 1948, p. 73). The only departure from that sound principle is the Aramco ruling by which this Commission of the State of New York flouts the principles of our Founding Fathers.

The record here under review reveals that the King of Saudi Arabia not only prohibits employment of Jews in Arabia, but also "strenuously objects to the employment of Jews in any part of Aramco's operation." (Testimony of Field Representative Anderson, pp.3-4.) Aramco can not by virtue of its contract even purchase electrical equipment from Philco, a domestic corporation, because of "its Jewish management." These are undisputed facts. *This court does not pretend to assert that Saudi Arabia may not do as it pleases with regard to whom it will employ within the borders of Saudi Arabia. Nor does this court pretend to say that Aramco may not hire whom it pleases to conform to its Arab master's voice. What this court does say is that Aramco can not defy the declared public policy of New York State and violate its statute within New York State, no matter what the King of Saudi Arabia says. New York State is not a province of Saudi Arabia, nor is the constitution and statute of New York State to be cast aside to protect the oil profits of Aramco. Nor will the fact, if it be such, that the employment is for possible service in Saudi Arabia permit the subversion of our State Law aimed to preserve our democratic heritages. The Senate of the United*

States on July 26, 1956, adopted Senate Resolution 323, which reads in part:

"Whereas it is a primary principle of our Nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinction among our citizens in the granting of personal or commercial access or any other rights otherwise available to United States citizens generally is inconsistent with our principles; Now, therefore, be it

"Resolved, that it is the sense of the Senate that it regards any such distinctions directed against United States citizens as incompatible with the relations that should exist among friendly nations, and that in all negotiations between the United States and any foreign state every reasonable effort should be made to maintain this principle."

That declaration of noble foreign policy remains today. The State Department has not sought to override the Senate of the United States and Aramco can not pretend that the State Department has done so. Aramco's witness before this Commission (Mr. Barry) frankly admitted that Aramco's employees had to submit "to this kind of interrogation with regard to their religion." Aramco has divided its employees into five categories, the lowest of which encompasses those in positions of limited promotion opportunities and who can not go to Saudi Arabia. It is a matter of record in these proceedings that out of some 887 employees on Aramco's New York payroll, few, if any, Jews are employed. If, as perhaps correctly claimed by Aramco, this must result from the necessity of possible employment in Saudi Arabia, the answer of New York State is simply—*Go elsewhere to serve your Arab master—but not in New York State.* Commissioner Carter admits that Aramco's policy "would appear to be contrary to the provisions of the New York Law Against Discrimination and the rulings of the Commission." However, he seeks an escape for Aramco in the "bona fide occupational qualification" which the history of this statute reveals finds no possible application to a religious qualification for employment in Saudi Arabia. It is interesting to find that the Urban League of Greater New York and the National Association for the Advancement of Colored People are on record in this proceeding

for the petitioner and against the decision of the Respondent Commission.

[Effect on Foreign Policy]

If, as claimed by Aramco, a change in employment policy would obstruct American foreign policy in the Near East; or if the enforcement of the public policy of New York State would embarrass the State Department in the Near East, then it should be said that the honor of American citizenship, if it remains for New York State to uphold it, will survive Aramco's fall from Arab grace. It is the holding of this court that an administration ruling which runs afoul of the constitution and the law must be set aside. Also, there is no longer any doubt that a dismissal of a complaint may be reviewed in an article 78 proceeding (*Matter of Jeanpierre v. Arbury*, 4 N.Y.2d 238; *Matter of Guardian Life Ins. Co. v. Bohlinger*, 308 N.Y. 174; *Matter of Stork Restaurant v. Boland*, 282 N.Y. 256, 274). The ruling of Commissioner Carter is unsupported by the evidence and violates the principles of the very law under whose mandate the Commissioner purported to act. This statute is protected under the Tenth Amendment of the United States Constitution (*Railway Mail Association v. Corsi*, 326 U.S. 88). There is no treaty, nor any Federal statute which stands in the path of enforcing the provisions of New York State's law against discrimination in employment. Informal statements of State Department underlings can not override State laws. No foreign nation may dictate the non-enforcement of a valid State law, at least not in New York State. *An engineer who is Jewish is no less an engineer by being so—and no cavalier attempt to classify him as not having a "bona fide qualification" because he is Jewish will be countenanced by this court. Any such holding—and the decision of Commissioner Carter is just that—destroys the safeguards of the First and Fifth Amendments of the Constitution of the United States.* It is abhorrent to the public policy of New York State also. The Commissioner's determination also fails to meet the standard of a proper administrative decision. There is no factual basis set forth, based on the record (*Matter of Barry v. O'Connell*, 303 N.Y. 46; *Matter of N.Y. Water Service Corp. v. Water Power and Control Commission*, 283 N.Y. 23). A letter from Aramco that "no applicant for domestic employment is requested to fill out an application for a Saudi Arabian visa" is hardly

a basis for the decision reached in this case. The record, however, even destroys this conclusion of the Commissioner (Items 22 and 23). The action of the Commissioner is arbitrary, capricious and without basis in fact or law. It runs counter to sound public policy of New York State and of the United States (U.S. v. Pinta, 315 U.S. 203, 230).

[No Treaty as to Jews]

There is no treaty; there is no compact; there is no agreement between the United States and Saudi Arabia relating to the entry of Jews into Saudi Arabia. Aramco's contract with the government of Saudi Arabia can not be given the status of a treaty of the United States and not even Aramco dares make any such assertion. That was clearly decided by the International Court of Justice in the Anglo-Iranian Oil Co. case (Report of International Court of Justice for 1952, p. 193). Aramco has, for reasons best known to itself, not made its contract with Saudi Arabia a part of the record. No such private contract can override the public policy or prevent the enforcement of the New York Law Against Discrimination. *When Commissioner Carter declares that American interests in the Near East "outweigh the abstract vindication of state sovereignty" he makes the Commission for which he speaks the vassal of a foreign potentate. When Commissioner Carter seeks to justify his dismissal of petitioner's case on a claim that "the security of the United States is involved" (Second determination, p.9), he arrogates to himself the function of the State Department of the United States which has made no such declaration. The film of oil which blurs the vision of Aramco has apparently affected the Respondent Commission in this case. The discrimination practiced by Aramco in New York State must*

cease and it is the duty of the Respondent Commission to see that it does. No treaty or statute will stand which impairs the freedom of one group of citizens because of religious affiliation. The free exercise of religion is thereby destroyed. Any such provision would clearly violate the Federal Constitution (First and Fifth Amendments). Surely, the Commissioner Respondent can not do what a Federal treaty or statute would be unable to achieve (United Public Workers v. Mitchell, 330 U.S. 75, 100).

[Saudi Authority Unquestioned]

In summary—petitioner does not question the authority of Saudi Arabia to decide that no Jews shall enter that country—the Commissioner may not, however, place the policy of Saudi Arabia above the law and public policy of New York State. No agency of New York State may subordinate the law of this State to the dictates of a foreign state which violates our own public policy. There is nothing in *Salimoff v. Standard Oil Co.*, 262 N.Y. 220, 224, nor in *Kleve v. Basler L.V. Gesellschaft*, 182 Misc. 776, to the contrary. If, as this Commission has held, "color" is not a "bona fide occupational qualification" (Report on Progress, 1958, p.73), then surely in 1959 "religion" can not be so regarded, Saudi Arabia and Aramco to the contrary notwithstanding.

This court accorded respondent Commission until July 14th at its request to confer with the United States State Department. On July 14th respondent advises that, after conferring with the State Department, it has "nothing to add to the record".

The determination of the Commission is annulled and the matter is remitted to the Commission for action not inconsistent with this opinion.

Dated, July 15, 1959.

EMPLOYMENT

Fair Employment Laws—Minnesota

Carl Leon CARTER v. McCARTHY'S CAFE, INC.

State of Minnesota, County of Hennepin, District Court, Fourth Judicial District, June 29, 1959, Reg. No. 532616.

SUMMARY: A Negro filed a complaint with the Minnesota Fair Employment Practices Commission against the corporate owner of a Minneapolis cafe at which he had been employed as a busboy, alleging a denial, for racial reasons, of a promotion to a position as a waiter, while two white men employed a shorter time had received such promotions. A Board of Review held a hearing and filed a finding of facts supporting the charges of discrimination. On motion of respondent, a state district court conducted a hearing and ordered that the action be tried de novo to the court. At the latter proceeding the court found that complainant in his original application had not asked to work as a waiter and failed to prove that he had ever later requested responsible parties for a promotion or that such had been denied him for racial reasons; that the white men promoted had initially applied to work as waiters and had since taken on-the-job training in the waiter's art as practiced in the respondent's cafe; and that complainant had never sought such training. The court said that, indulging every leniency to complainant's testimony, there was equally as much reason to infer that respondent's actions were not motivated by racial considerations as to infer that they were. Concluding as a matter of law that there had been no racial discrimination and that the Board of Review's findings of fact were unsupported by competent and substantial evidence, the court dismissed the complaint. The court's findings of fact, conclusions of law, order for judgment, and a supplemental memorandum follow.

BELLE, Judge

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, at a regularly scheduled general term thereof, at the Courthouse in the City of Minneapolis, on the 2nd day of June, 1958, for trial de novo to the Court sitting without a jury;

And the Court, having heard the evidence and the arguments of counsel, and being fully advised in the premises, makes the following:

FINDINGS OF FACT

I.

Respondent is a Minnesota Corporation, correctly known at McCarthy's St. Louis Park Cafe, Inc.

II.

Carl Leon Carter, hereinafter referred to as Carter, was an employee of Respondent from May 10, 1951 to June 23, 1951, and from January 5, 1952 to July 4, 1955. He is a negro.

III.

At the time Carter originally applied for work with Respondent, he did not specifically ask for work as a waiter. He was offered and accepted a job as a busboy.

IV.

At all relevant times, the persons in charge of hiring waiters for Respondent were one Richard F. Kleidon and one Stanley Leach. At no time did Carter, according to his testimony, indicate to either of these persons that he desired to become a waiter.

V.

Carter claimed to have had two "casual conversations" with one Arne Gunderson, Respondent's maitre d'hotel, concerning the possibility of his promotion to a waiter. He did not believe that these conversations made any impression on Gunderson. Gunderson denied that Carter ever asked him for a waiter's job. It appears to the Court that on neither occasion, assuming such conversations took place, did Carter make a direct request of Gunderson to be made a waiter. Gunderson was not responsible for hiring or upgrading personnel.

VI.

At all relevant times, one Jeremiah Murphy was Respondent's manager. Carter claims to have discussed the question of becoming a waiter with Murphy on three occasions.

On the first occasion, Carter does not remember what response he received. On the second

occasion, Murphy summoned Carter to his office to reprimand him for attempting to unionize the kitchen help. During the course of this conversation, Carter made the remark that he could work there ten or fifteen years and be nothing but a bus boy, and Murphy replied that he could work there fifty years and be nothing but a bus boy. The Court finds that this remark was not made on the basis of Carter's race or color, but because of Murphy's annoyance with Carter over his union organizing activities during working hours.

The third conversation on this subject took place on July 4, 1955, after 10:30 p.m. Carter had then already quit in the middle of a busy night because of his irritation over the fact that two other men had become waiters and he had not. He stated to Murphy that he thought it was funny he couldn't get a promotion and Murphy taxed him with the fact that he had previously refused a promotion to bar boy. Carter did not, on this occasion, ask to be rehired as a waiter or anything else, and Murphy did not offer to rehire him.

VII.

Two persons, House and Wegner, who had worked for Respondent a shorter time than had Carter, were promoted from bus boy to waiter on July 4, 1955. Each of these men had specifically applied in the first instance for the job of waiter. In addition, each of them had devoted his own time, after working hours, to studying the waiter's art as practiced at Respondent's cafe, and had taken home menus and literature to study. One of these men, Wegner, had studied the waiter's art formally in Germany. The Court finds that the promotion of these men was not shown to be motivated by racial discrimination.

VIII.

Carter had some experience waiting tables before coming to Respondent. He may or may not have been qualified by Respondent's standards for a waiter. In any event, he did not seek any training as such from Respondent nor directly indicate to the responsible personnel his desire to be a waiter if he had it.

IX.

At all times during his employment, Carter had full-time jobs elsewhere, which took more of his time than did his work for Respondent. He sought and received the privilege of coming to work later than other employees because of this. He was regarded as part-time help.

X.

Carter's conduct as a bus boy was not such as to make his superiors regard him as a favorable subject for promotion. Kleidon, the day manager, complained of him that he was not alert to perform his duties, but often had to be sought out to attend to them.

Leach, the night manager, did not consider him a good worker, and found his attitude uncooperative when he attempted to correct him about specific shortcomings.

The chef found it necessary to complain to Leach and Murphy about his noisy conduct in the kitchen and his penchant for engaging the kitchen help in conversation during rush hours.

Gunderson had to seek him out to get him to do his chores, and Smith, a bartender, also found that things were often not done and had to send someone after Carter. Carter refused a promotion to bar boy, with a bartender's job in sight, because he made more money as a bus boy. Instead of attending to his duties, he would perform extraneous services for customers in the hope of tips.

XI.

Respondent had a substantial number of negro employees. None of them was a waiter. The Court finds that this was not the result of a policy of discrimination on the part of the Respondent, but of the fact no negro had ever applied for a position as waiter.

CONCLUSIONS OF LAW

I.

Respondent has not discriminated against Carl Leon Carter with respect to his hiring or upgrading because of his race or color.

II.

Respondent has committed no unfair employment practice against Carl Leon Carter within the meaning of Minnesota Statute 363.

III.

The Findings of Fact of the Board of Review are not supported by competent and substantial evidence.

ORDER FOR JUDGMENT

IT IS ORDERED that the Findings of Fact, Conclusions of Law, and Order entered by the Board of Review on October 11, 1957, be and they hereby are, vacated and set aside;

IT IS FURTHER ORDERED that this pro-

ceeding be dismissed, and that Judgment of Dismissal be entered in favor of Respondent.

IT IS FURTHER ORDERED that Respondent have its costs and disbursements.

Let Judgment Be Entered Accordingly.

MEMORANDUM

Due to the long delay in this case the Court feels that a chronological history of the proceedings might tend to clarify some of the reasons for such delay.

These proceedings arose out of a complaint of discrimination under the provisions of Chapter 516, Session Laws of 1955, which became effective as of July 1, 1955. On July 4, 1955, the Complainant in this proceeding quit his employment with the Respondent and on July 9, 1955 filed a complaint with the Minnesota Fair Employment Practices Commission alleging that he was discriminated against. On July 14, 1955, this Complaint was referred to the Hon. Orville L. Freeman, Governor of the State of Minnesota. Thereafter the matter was held until after the official organization of the State Fair Employment Practices Commission. On November 2, 1955 the Executive Director of such Commission started an investigation of the allegations contained in the complaint and on December 15, 1955 a copy of the Complaint was sent to the attorney representing the Respondent.

Thereafter the "Commission" requested the Governor to appoint a Board of Review to hear and determine the matter and such Board was appointed and the hearing was set for March 1, 1957 for the taking of testimony by said Board of Review and testimony was thereafter taken by said Board upon the formal Complaint which had been served upon the Respondent on February 6, 1957, and on or about October 11, 1957 The Board of Review filed its Findings of Fact.

A notice of Motion was served by the Respondent on October 19, 1957 for the relief set forth in said Petition attached to said Notice of Motion and the matter was assigned to the undersigned, one of the Judges of the above named Court and a hearing was had on the 14th day of November, 1957, and a further hearing on January 6, 1958, briefs being submitted by both parties. After the submission of said Briefs, the Court on March 26, 1958 filed its Order that the said action be tried de novo to the court and denying the motions of the parties.

Said case was thereafter set down for trial on

June 2, 1958 and the matter was heard on said date and the two following days. At the trial thereof the Court suggested to counsel that the presence of several witnesses might be avoided if counsel would stipulate and agree into the record that testimony given by some of the witnesses at the hearing before The Board of Review might be received in evidence and it was so stipulated with the understanding that either party might object to said testimony and objections were made and motions were made and on June 27, 1958 this Court made an Order ruling on said matters and the last paragraph of said order states as follows:

"The foregoing constitutes all rulings which were reserved at the time of the presentation of evidence here, and the Court now considers the testimony completed and the evidence closed. The Court cannot now consider oral arguments in this matter and requests that counsel file such Memoranda as they may desire in connection with this matter."

Counsel did not furnish the Court with the Memoranda requested in said Order and on November 20, 1958 a Motion was filed by the Minnesota State Fair Employment Practices Commission for an Order vacating the previous order granting a trial de novo. Subsequent to this the undersigned, on several occasions wrote counsel for the Briefs which had been requested in the Court's Order hereinbefore set forth, and the first Brief was received by this Court on April 10, 1959 and the last Brief on May 18, 1959.

With reference to the attached findings, conclusions of law and order for judgment, the Court wishes to comment as follows:

The burden was on the commission to prove that Respondent failed to promote Carter for discriminatory reasons. This burden was not met. The conversations, as described by Carter himself, leaving aside the other parties' denials that they took place, fail to show either 1) that Carter requested promotion, or 2) that it was denied him for racial reasons. Respondent's conduct in promoting two other employees is consistent either with discrimination or with other motives, and thus fails affirmatively to prove discrimination. The same is true of the failure to promote Carter, standing alone. It could be because Carter is a negro, certainly; equally, it could be because he was not an outstanding employee.

The Court is very appreciative of the fact that the Board of Review had the opportunity to see the witnesses, while the Court did so only to a limited extent. The Court has given full weight to the testimony tending to support the Board's findings, even to take Carter's testimony as true where ever possible in preference to that contradicting it, even though this was a trial de novo. But indulging every leniency to all this testimony, it falls short of affirmative proof that discrimination was practiced. At most, it can be said to give rise to a suspicion or guess that such was the case. Equally, or more, it gives rise to the inference that everything respondent did or said was done or said without the faintest thought of race or color. That is not "substantial evidence" justifying the Board or this Court in placing Respondent under the tutelage or "con-

tinuing supervision" of the Commission with respect to all its personnel policies.

The Court is aware that this decision may be criticized by some persons who, knowing nothing of the facts, will assert that it legalizes racial discrimination in general. To those persons, the Court can only say that while it is easy to be against sin, it is hard to know whether or not one has in fact caught a sinner. Until an infallible test is devised, the Court will continue to do its duty as it sees it, and will continue to require that findings that anyone has done unlawful acts, be based upon evidence, and not upon speculation, conjecture or even righteous indignation against a particular class of unlawful acts.

Let the foregoing Memorandum be made a part of all the files and proceedings herein.

EMPLOYMENT

Labor Relations—United States

Walter ALLEN et al. v. UNITED STATES.

United States Court of Claims, June 3, 1959, 173 F.Supp. 358.

SUMMARY: An action against the United States was brought in the U. S. Court of Claims by, or in behalf of the estates of, 47 Negroes who had worked as trainmen for the Missouri Pacific Railroad at various times between 1933 and 1956, during all of which period the railroad, while being reorganized under the federal Bankruptcy Act, was operated by trustees appointed by and under the control of a federal district court. Plaintiffs alleged that since 1921 the railroad and the all-white Brotherhood of Railroad Trainmen had had an agreement whereunder Negroes were not employed as brakemen and white men were not employed as train-porters, brakemen being paid higher wages; and that plaintiffs had performed the functions, but had not received the pay of brakemen, though being also required to perform porter duties not required of white brakemen. The suit was for the additional wages plaintiffs claimed to have earned. Recovery was denied, the court stating that if the alleged practices were illegal, plaintiffs could have complained to the district court supervising the reorganization, and holding that the doctrine of *Shelley v. Kraemer* [334 U.S. 1 (1948)] that governments may not through their judicial branches become particeps to racial discrimination did not make the United States liable in a situation wherein a federal court did not enforce a discriminatory practice.

PER CURIAM.

This suit is brought by, or on behalf of the estates of 47 persons, herein referred to as the plaintiffs, who at some time between June 22,

1933, and October 15, 1956, worked as trainmen on the Missouri Pacific Railroad. During that period the railroad was operated by trustees appointed by, and under the supervision and control of, the District Court of the United States

for the Eastern District of Missouri. The reason for the trusteeship under judicial supervision was that the railroad was going through the process of reorganization of its capital structure pursuant to the provisions of section 77 of Chapter VIII of the Bankruptcy Act, 47 Stat. 1474, 11 U.S.C. § 205.

[Background]

The plaintiffs were Negroes. During their employment with the railroad they were known as "train-porters" which was a classification applied exclusively to Negroes. As "train-porters" they assisted passengers with their baggage, and performed other tasks. But in addition to those tasks, they performed all of the functions of "brakemen" on passenger trains. They were not, however, paid the wages which white men who worked as brakemen on passenger trains were paid.

During World War I, while the railroads were administered by the Government through the agency of a Director General of Railroads, men who did the kind of work which the plaintiffs did were classified as brakemen, or porter-brakemen, and received brakemen's pay. The railroads were returned to private management in 1921, and then the Missouri Pacific and the Brotherhood of Railroad Trainmen, a union which admitted no Negro members, entered into an agreement whereunder Negroes would not be employed as brakemen, and white men would not be employed as "train-porters" on passenger runs. Thereafter the plaintiffs worked as train-porters, and as such received less pay than brakemen. This practice continued from 1921 until the railroad went into the trusteeship in 1933, and continued through the trusteeship until 1956, when the railroad was returned to the direct management of its owners. So far as we are advised, the practice still continues.

[Racial Discrimination Alleged]

The plaintiffs allege that the practice of paying Negro brakemen less than white brakemen, and of requiring Negro brakemen to perform porters' duties in addition to brakemen's duties, was "unjust and discriminatory." That much would seem to be obvious. They further say that the practice was violative of the plaintiffs' constitutional and statutory rights. In this proceeding they are suing the United States for the additional wages which, they say, they

earned but were not paid because of the discriminatory practice.

The plaintiffs cannot recover. When a sovereign sets up courts for the adjudication of the rights of its citizens, it makes available to its citizens an essential and useful service. It does not thereby undertake to right all wrongs out of the public treasury. It may well be that the alleged discriminatory practice of the railroad while it was in private management between 1921 and 1933 was, if it occurred, a violation of law. See *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173. If so, the "train-porters" had the same access to the courts that the complainant had in *Steele*. During the period covered by the instant suit, the Missouri Pacific was operated by trustees appointed by and under the supervision of a District Court of the United States. If the alleged discriminatory practice was illegal, it would seem that a complaint could have been made to the court, which could have required the trustees to operate the railroad in all respects in conformity with the law. So far as appears, no such complaint had been made. If complaint had been made and the District Court had failed to properly protect the legal rights of the plaintiffs, appellate relief would have been available.

[*Shelley v. Kraemer* Inapplicable]

Instead of asserting their alleged rights in tribunals made available to them by the Government for that purpose, they sue the Government for money compensation for their asserted wrongs. They seek to stretch the doctrine of such cases as *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, to make it fit their situation. The doctrine of those cases is that the States and the Federal Government, through their judicial branches, will not become *particeps* to a racial discrimination, by judicially enforcing a discriminatory agreement between private persons. We have no such situation here. The United States did not own the railroad, nor employ the plaintiffs. It merely made available to a railroad in financial distress a judicial proceeding which might lead to a rational reorganization. Because of the court's supervisory powers, relief from illegal employment practices would seem to have been more easily available than in the normal situation. But the court did not become a policeman on a beat, charged with the duty of detecting violations of which no complaint was made. The United States did not, through

its judicial branch, enforce a discriminatory practice against the plaintiffs. And if there had been, which there was not, any error or neglect of duty on the part of the court, the United

States would not have become liable to compensate the victim of that error.

The plaintiffs' petition will be dismissed.
It is so ordered.

EMPLOYMENT

Labor Unions—Federal Statutes

Vincent P. BRADY v. TRANS WORLD AIRLINES, Inc., and the International Association of Machinists.

United States District Court, District of Delaware, June 10, 1959, 174 F.Supp. 360.

SUMMARY: A contract between an airlines company and a machinists union required good standing membership in the union as a condition of employment. An employee accused by the union of defaulting on dues payments was discharged. Following a protest to the employer-union System Board of Adjustment resulting in a decision adverse to him, the employee brought an action in federal district court under the Railway Labor Act seeking a reversal of the Board decision, reinstatement, back pay for the period of discharge, and damages for humiliation due to discharge without cause. [See 156 F.Supp. 82 (D.Del. 1957) and 167 F.Supp. 469, 4 Race Rel. L. Rep. 333 (D. Del. 1958) for two previous decisions in this case]. The union moved to dismiss a second amended complaint on the grounds that the court lacked jurisdiction over the subject matter of the complaint and that the complaint failed to state a claim. The amended complaint alleged that plaintiff was not delinquent in dues, having tendered them, but that the union wanted to be rid of him and refused his tender while accepting other members' tender, and misrepresented the fact concerning his dues payments in an all-out effort to have him discharged, while taking no action against other members who were actually delinquent. Denying the motion to dismiss, the court held that the complaint set forth a cause of action subject to federal jurisdiction, in alleging affirmative discriminatory action by the union in causing plaintiff's discharge, so as to constitute a breach of the bargaining representative's duty under the Railway Labor Act to represent all members of the craft fairly and without discrimination, under the rule of *Conley v. Gibson*, 355 U.S. 41, 2 Race Rel. L. Rep. 1093 (1957).

EMPLOYMENT

Labor Unions—Federal Statutes

Al MARSHALL et al. v. CENTRAL OF GEORGIA RAILWAY COMPANY et al.

United States Court of Appeals, Fifth Circuit, June 30, 1959, 268 F.2d 445.

SUMMARY: Negro firemen brought a class action in 1949 in a federal district court in Georgia, seeking to enjoin their union bargaining agent and a railway company from enforcing a collective bargaining agreement claimed to be racially discriminatory. The agree-

ment referred to Negro firemen as "nonpromotable" and limited their number to 50% in each class of service. A consent decree was entered in 1952, permanently enjoining defendants from such racial discrimination. In 1957 five Negroes intervened in the case and filed a petition against the defendants for a rule to show cause why they should not be held in civil contempt for violation of the injunction. The intervenors claimed that the defendants, by adding "swing men" to take certain runs from individual firemen, had reduced the intervenors' mileage and pay solely because of race and solely to the benefit of the white firemen. The court, finding that the addition of "swing men" had reduced the mileage and pay of white firemen as well as Negro firemen and that the runs were open to the bidder with the highest seniority without regard to race or color, held that racial discrimination had not been proved. 174 F.Supp. 33, 3 Race Rel. L. Rep. 680 (M.D. Ga. 1958). The Court of Appeals for the Fifth Circuit, in a per curiam opinion, affirmed on the basis of the district court's opinion.

GOVERNMENTAL FACILITIES Metropolitan Redevelopment—Alabama

E. F. BARNES, J. C. Carson, J. Jelks and J. Robertson v. CITY OF GADSDEN, ALABAMA et al.

United States Court of Appeals, Fifth Circuit, June 30, 1959, 268 F.2d 593.

SUMMARY: In a class action against the City of Gadsden, Alabama, and its Housing Authority, four Negro citizens sought in federal district court a declaratory judgment and injunction against the execution of urban redevelopment plans, on the ground that they would discriminate against Negroes. The court first held that, the threat of immediate and irreparable damage not having been shown, a preliminary injunction would not issue [3 Race Rel. L. Rep. 712 (1958)]; and, after a hearing on the merits, it entered a judgment for the defendants, declaring that if, as plaintiffs apprehend, private interests should in the future restrict sales and occupancy along racial lines, such would not be state action in violation of plaintiffs' rights. The court also refused as an alternative to require the Authority to grant prior rights of purchase in favor of former residents of the area involved. 174 F.Supp. 64, 3 Race Rel. L. Rep. 1017 (1958). On appeal, the Court of Appeals for the Fifth Circuit, with one judge concurring in part and dissenting in part, affirmed on the basis of the trial court's findings of fact and conclusions of law.

Before RIVES, CAMERON, and JONES, Circuit Judges.

RIVES, Circuit Judge.

This appeal is from a final judgment for defendants. The plaintiffs seek a declaration and injunction against the execution and putting into effect of certain urban redevelopment plans of the City of Gadsden, Alabama, attacked upon the ground that they foster enforced racial segregation. The district court entered judgment in favor of defendants pursuant to findings of fact

and conclusions of law, now reported in 174 F.Supp. 64, with which all of the members of this Court were tentatively in agreement in our first conference following the argument and submission of this appeal. After further study and more mature deliberation, Judges Cameron and Jones adhere to that view while the writer concurs in part and dissents in part for reasons separately stated. The judgment is therefore Affirmed.

Rives Opinion

RIVES, Circuit Judge (concurring in part and dissenting in part).

A careful study of the record and exhibits has convinced me that there are controlling additional facts, themselves either undisputed or conclusively established, which were not noted in the district court's findings of fact. Recognizing the importance of this litigation to the public as well as to the litigants, I have set forth those facts at considerable length in an appendix to this opinion. Excluding those items of doubtful value or of questionable admissibility, but otherwise carefully considering the entire record, I cannot escape the conclusion that *actual* segregation is contemplated. So long as that is voluntary, rather than governmentally enforced, there can be no constitutional objection. As we said in *Cohen v. Public Housing Administration*, 5 Cir., 1958, 257 F.2d 73, 78:

"Mr. Stillwell's testimony has been noted (footnote 7, *supra*) to the effect that in his opinion actual segregation is essential to the success of a program of public housing in Savannah. If the people involved think that such is the case and if Negroes and whites desire to maintain voluntary segregation for their common good, there is certainly no law to prevent such cooperation. Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races but only negatively to forbid governmentally enforced segregation."¹¹

"11. Cf. *Avery v. Wichita Falls Independent School District*, 5 Cir., 1957, 241 F.2d 230, 233; *Rippy v. Borders*, 5 Cir., 1957, 250 F.2d 690, 692."

[What Kind of Enforcement?]

That governmentally enforced segregation in housing is unconstitutional has now been settled beyond controversy.¹ The cases just cited in footnote 1 make clear that a State agency has no constitutional power to oust persons of one

race from their homes and thereafter forcibly to restrict the land to the exclusive occupancy of persons of another race. Ultimately then, the issue on its merits must turn upon whether the contemplated actual segregation is to be voluntary or governmentally enforced. At the present stage the plaintiffs and the defendants face real, though different, dilemmas in reaching that issue. The plaintiffs feel that they cannot wait longer. As their attorney stated to the district court:

"Mr. Burns: That is the very reason why we have to do this now. If we wait until the private developers get it into their hands, it's too late.

"In that *Levitown* case, where the Court said that the Court would not require the private developer to sell; allowed him to discriminate, where it was without dispute that he was discriminating and the Court let him do it."

[Plaintiffs' Dilemma Recognized]

In its conclusion of law the district court recognized, if it did not resolve, the plaintiffs' dilemma [174 F. Supp. 67]:

"The Court concludes from an analysis of plaintiffs' complaint, evidence and arguments that their claim for relief is grounded primarily on the apprehension that when the two areas are cleared and rehabilitated and sold to private interests under legitimate restrictions as to use that plaintiffs' and members of their class will not be able to purchase property in the Birmingham Street Area because of their race or color, *Dorsey v. Stuyvesant Town Corp.*, 229 N.Y. 512, 87 N.E.2d 541, 14 A.L.R.2d 133, certiorari denied 339 U.S. 981, 70 S.Ct. 1019, 94 L.Ed. 1385, and that if they purchase homes in the North Fifth Street Area they will be racially segregated in that area, and, therefore, they should be delivered from the apprehension of this possible dilemma by injunctive relief, preventing the carrying out of the plans which, they insist,

1. *Buchanan v. Warley*, 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149; *Harmon v. Tyler*, 1927, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831; *City of Richmond v. Deans*, 1930, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128; *Shelley v. Kraemer*, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; *Barrows v. Jackson*, 1953, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586; *City of Birmingham v. Monk*, 5 Cir., 1950, 185 F.2d 859; *Detroit Housing Commission v. Lewis*, 6 Cir., 1955, 226 F.2d 180; *Tate v. City*

of Eufula, Alabama, D.C., M.D., Ala. 1958, 165 F.Supp. 303; *Jones v. City of Hamtramck*, D.C.E.D. Mich. 1954, 121 F.Supp. 123; *Vann v. Toledo Metropolitan Housing Authority*, D.C. N.D. Ohio 1953, 113 F.Supp. 210; *Banks v. Housing Authority*, 1953, 120 Cal.App.2d 1, 260 P.2d 668; *Taylor v. Leonard*, 1954, 30 N.J.Super. 116, 1954, 103 A.2d 632.

constitute a scheme and design for initiating, enforcing, extending and perpetuating racial segregation in residential areas of Gadsden in violation of their constitutional rights. Otherwise, they see no escape from their anticipated predicament once the properties are sold to private interests; and they are fearful in that event that their last state will become worse than their first.

"If the Court assumes that private interests will restrict sales in the Birmingham Street Area to white people and the North Fifth Street Area to colored people, such sales would not be actions under color, authority, or constraint of state law, nor would they be the performances of functions of a governmental character. *Dorsey v. Stuyvesant Town Corp.*, supra, *Johnson v. Levitt & Sons, Inc.*, D.C.E.D.Pa., 131 F.Supp. 114."

The defendants, on their part, stoutly deny that any enforced segregation is contemplated. Their brief states:

"In this case no one is compelled to occupy the new houses to be constructed, and no one is prohibited from purchasing such houses; anyone buying any of the property will have to buy it with full knowledge that there can be no discrimination in the future.

"The court should assume that the defendants, their agents and successors in office, after receiving the federal assistance in this public project, will, upon completion of this project, or in carrying it out, recognize the law to the effect there can be no governmentally enforced segregation solely because of race or color. *Tate v. City of Eufaula* [Alabama, D.C.], 165 F.Supp. 303."

[Defendants' Contention]

The defendants point out that the plaintiffs may not, when the time comes, want to move back into either of the Areas:

" * * * it boils down to the question of whether a complaint based on plaintiffs' alleged fears that they may not be able to repurchase land in the redeveloped area states a cause of action upon which relief can be granted. It is obvious that such redevelopment cannot be accomplished in a

short period of time. It is equally obvious that not only plaintiffs but all occupants of the North Fifth Street area and the Birmingham Street area must be moved and relocated pending such clearance. It is by no means clear that plaintiffs or any of the occupants of these areas will even want to move back into such areas after redevelopment. Yet these plaintiffs are insisting that the entire slum clearance project be stopped on such a complaint."

I agree that the serious injury which the public may suffer from the stoppage of the slum clearance projects, and the desire to afford every opportunity for the voluntary cooperation of the members of all races for their common welfare and betterment are potent factors tending to cause the Court to exercise its discretion to deny an injunction at the present stage of development of the plans. As said by Judge Sibley, speaking for this Court in *Kelliher v. Stone & Webster*, 5 Cir., 1935, 75 F.2d 331, 333, 334:

" * * * and when a public improvement is sought to be stopped, the inconvenience to the public, as weighed against a slight or remediable wrong to the plaintiff, may determine the court of equity against this discretionary remedy."

[Anticipated Injury Serious]

The injury which the plaintiffs anticipate, namely, that they may be forced to dispose of their homes for an unconstitutional purpose, cannot be called slight. Rather, the questions are whether the plaintiffs will suffer a legal wrong and whether, at the present stage, their plight is irremediable. If irreparable injury to the plaintiffs will ensue, and if such injury cannot be otherwise prevented, then a suit for injunction restraining the carrying out of the plans is appropriate to present the question of a proposed unlawful exercise of the power of eminent domain for the purpose of subjecting the property taken to a racially discriminatory and unconstitutional use.²

2. *City of Los Angeles v. Los Angeles Gas & Electric Corporation*, 1919, 251 U.S. 32, 40 S.Ct. 76, 64 L.Ed. 121; *Iowa Electric Light & Power Co. v. City of Lyons, Neb.*, D.C.Neb.1958, 166 F.Supp. 676, 680; *Quinn v. Dougherty*, 1928, 58 App.D.C. 339, 30 F.2d 749; *Reichelderfer v. Quinn*, 1931, 60 App.D.C. 325, 53 F.2d 1079, reversed on merits 1932, 287 U.S. 315, 53 S.Ct. 177, 77 L.Ed. 331; 30 C.J.S. Eminent Domain §§ 403, 407; 18 Am.Jur., Eminent Domain, Sec. 386.

The "Controls on Redevelopment," including the requirement of an anti-racial covenant, go a long way to protect the plaintiffs from governmentally enforced segregation. They do not, however, afford adequate protection if the redeveloper is free to restrict sales in the Birmingham Street Area to white people and in the North Fifth Street Area to Negroes. Enforced segregation might well be the practical result, whether or not so intended by the defendants. The plaintiffs might derive some small comfort from hearing a court tell them that their segregation was privately enforced rather than governmentally enforced. They might still feel that they stood equal before the law.

While the district court entered formal judgment for the defendants, it did not in fact decline to make any declaration of the rights of the parties, but in those parts of its conclusions of law which I have quoted, 174 F.Supp. at page 68, as construed in connection with the cases cited, it held that the redeveloper is a mere private individual and as such free to discriminate in sales to persons of different races. For reasons presently to be stated, I do not agree with that conclusion, but, by the same token, I do agree that injunction at the present stage of development of the plans should be denied.

[Held Not State Action]

The district court relied upon two cases in considering that sales by the redeveloper would not constitute state action within the meaning of the Fourteenth Amendment. *Dorsey v. Stuyvesant Town Corporation*, 1949, 299 N.Y. 512, 87 N.E.2d 541, 14 A.L.R.2d 133, and *Johnson v. Levitt & Sons*, D.C.E.D.Pa. 1955, 131 F.Supp. 114. In the *Johnson* case the district court held that F.H.A. and V.A., as federal agencies guaranteeing mortgages on housing projects, had no duty to prevent discrimination in sales of houses, and injunction did not lie to restrain agencies from insuring mortgages so long as the project proprietor discriminated against purchasers because of race and color.³

In *Dorsey v. Stuyvesant Town Corporation*, supra, the New York Court of Appeals held that a corporation organized under the New York Redevelopment Companies Law, McKinney's Unconsol.Laws, § 3401 et seq., to provide low-cost housing is not an agency of the state and

hence is not prohibited by the equal protection clauses of the State and Federal Constitutions from discriminating against prospective tenants because of race, color, or religion. The case is unusually well considered both by Judge Bromley, speaking for the majority of four, and by Judge Fuld, speaking for the three dissenting Judges. The majority arrives at the conclusion that:

" * * * The aid which the State has afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into State action under the constitutional provisions here in question." 299 N.Y. 536, 87 N.E.2d 551, 14 A.L.R.2d 146.

[Extensive Government Aid]

The extent of the aid furnished by the State and Federal Governments to the redeveloper and of the control to which the redeveloper is subject readily distinguishes the present case from either of the cases upon which the district court relied. In *Johnson v. Levitt & Sons*, supra, the federal agencies simply guaranteed mortgages on housing projects. In *Dorsey v. Stuyvesant Town Corporation*, supra, the City of New York agreed to condemn the land necessary for the project and to grant a tax exemption, but the full cost of construction and land acquisition was to be borne by the corporation. In the present case, the entire cost of land acquisition, and of the land itself, less such "use value" as may be required to be paid by the redeveloper, is to be borne by government funds, approximately two-thirds by the United States and one-third by the City of Gadsden. Of even more importance, the redeveloper is an essential participant in the overall plans for redevelopment here involved. The federal statute made it necessary for the Authority to require the redeveloper to carry the plan into execution.⁴

4. "§ 1455. Requirements for loan—or capital-grant contracts

"Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

"Obligations of purchasers, lessees, and assignees of property

"(b) When real property acquired or held by the local public agency in connection with the project is sold or leased, the purchasers or lessees and their assignees shall be obligated (i) to devote such property to the uses specified in the urban renewal plan for the project area; (ii) to begin within a reasonable time any improvements on such

3. Compare *Ming v. Horgan*, Super.Ct. Sacramento County, Calif., 1958, reported in 3 Race Relations Law Reporter 693.

The formal plans approved by the City of Gadsden contained detailed and specific "Controls on Redevelopment" requiring "The redeveloper to begin and complete the development of Project Land acquired by it for the use required by the Redevelopment Plan * * *." If *Dorsey v. Stuyvesant Town Corporation*, supra, had presented a like extent of governmental aid and of state control of the corporation, I believe that the majority must have agreed with the dissenters' view that:

" * * * Unmistakable are the signs that this undertaking was a governmentally conceived, governmentally aided and governmentally regulated project in urban redevelopment." 299 N.Y. 542, 87 N.E.2d 555, 14 A.L.R.2d 150.

[Reference to Recent Cases]

I would not repeat a reference to the authorities so well discussed in *Dorsey v. Stuyvesant Town Corporation*, supra, but would refer briefly to a few later decisions. Among these is our own case of *Derrington v. Plummer*, 5 Cir., 1956, 240 F.2d 922, in which we held that, where a county leases a cafeteria in a newly constructed courthouse to a private tenant operator, the tenant's exclusion of persons merely because they were Negroes constituted state action in violation of the Fourteenth Amendment.⁵

In *N.A.A.C.P. v. State of Alabama*, 1958, 357 U.S. 449, 462, 463, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488, the Supreme Court said:

"We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these

members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

"It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from state action but from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."

A few other late Supreme Court cases illustrative of the principle that governmental action may include the action of a private person who performs a governmental function are: *Brotherhood of Railroad Trainmen v. Howard*, 1952, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283; *Terry v. Adams*, 1953, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, and *Commonwealth of Pennsylvania v. Board of Directors of City Trusts*, 1957, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792.

[Judge Rives' Opinion]

In my opinion, the plan has not been completed until the property passes out of the control of the redeveloper, and hence in disposing of property within either of the Areas the redeveloper may not discriminate between purchasers on the basis of race or color. We should, I think, follow the course so well outlined by Judge Johnson of the Middle District of Alabama in *Tate v. City of Eufaula, Alabama*, D.C. M.D.Ala.1958, 165 F.Supp. 303, 306, 307:

" * * * this Court must now assume that these defendants, their agents and succes-

property required by the urban renewal plan; and (iii) to comply with such other conditions as the Administrator finds, prior to the execution of the contract for loan or capital grant pursuant to this subchapter, are necessary to carry out the purposes of this title: *Provided*, That clause (ii) of this subsection shall not apply to mortgages and others who acquire an interest in such property as the result of the enforcement of any lien or claim thereon." 42 U.S.C.A. § 1455(b).

5. That holding, it may be noted, was cited with approval by the Supreme Court in *Cooper v. Aaron*, 1958, 358 U.S. 1, 17, 78 S.Ct. 1401, 3 L.Ed.2d 5.

sors in office, after receiving the federal assistance in this public project, will, upon a completion of this project (or any phase of it), recognize the law that is now so clear; this law being to the effect that there can be no governmentally enforced segregation solely because of race or color. * * *

"If these defendants, their agents or successors, as public officers and with federal financial assistance complete this project or any phase of it, they do so with the certain knowledge that there must be a full and good faith compliance with this existing law."

I agree that the judgment should be affirmed in so far as it denies an injunction, but, to the extent that it seems to me actually but erroneously to declare the rights of the parties, I think that the judgment should be reversed and judgment here rendered declaring such rights as stated in this opinion. I therefore concur in part and dissent in part.

Appendix

Material Facts Not Fully Set Forth in the District Court's Findings.

The City of Gadsden is an Alabama municipal corporation,¹ and the Greater Gadsden Housing Authority is a public body corporate organized under the laws of the State of Alabama.²

Each of the four Negro plaintiffs owns a house in which he resides located in the Birmingham Street Area. Each member of the represented class of about fifty other Negro citizens owns a house in one of the areas planned for redevelopment. The North Fifth Street Area contains a considerable amount of vacant land and is planned to be redeveloped ahead of the Birmingham Street Area, so as to provide living space in the form of 128 small building lots for some of the families displaced by the later demolition of the Birmingham Street Area. The latter area is then to be redeveloped to provide 121 large building lots for single-family homes. The Authority admits in its answer that it plans to

purchase or acquire by eminent domain all of the property in the two Areas planned for redevelopment.

The Agreements between the City and the Authority disclose that, in order for the Authority to effectuate the plans,

" * * * the assistance of both the Federal Government and the City is required; namely of the Federal Government by lending funds needed to defray the gross cost of the Project, and upon completion of the project and repayment of such loan, by contributing two thirds ($\frac{2}{3}$) of the net cost of the project; and of the City by making certain local grants-in-aid (as specified by Title I of the Housing Act of 1949, as amended) as hereinafter provided, in a total amount equal to at least one-third ($\frac{1}{3}$) of the net cost of the Project * * *."

The formal redevelopment plan of the North Fifth Street Area approved by the City provides that:

"The North Fifth Street area will, after redevelopment, provide 141 units, with FHA Commitments [sic] (tentatively approved) open to non-white occupancy. 73 single family sales units in the price range of \$6,500 to \$8,500, 64 duplex units in the rental ranges of \$40.00, \$45.00 and \$50.00 shelter rent per month, will be available.

"c. Recreational and Community Facilities—The setting aside of land for the use of the City for the erection of a needed Civic Center with adjacent playfield and picnic area is in keeping with the adjacent facilities already erected (Negro Swimming Pool three blocks away). Also the City Board of Education took into consideration the Redevelopment Plan when they erected an elementary school which is located approximately eight blocks away from the Project Area."

After reading the foregoing paragraph, Mr. Mills testified: "That is in fact a colored school."

The formal redevelopment plan of the Birmingham Street Area approved by the City also states: "The North Fifth Street area will, after redevelopment, provide 138 units, with FHA Commitments [sic] (tentatively approved) open to Negro Occupancy."

The document principally relied on by the

1. The laws of Alabama authorize the City to join in the execution of the plans for urban redevelopment. 1940 Code of Alabama, Title 25, Section 3.
2. The powers of the Authority are detailed in 1940 Code of Alabama, Title 25, Section 12. Section 15 of the same title vests the Authority with the right to acquire property by eminent domain.

plaintiffs was made Exhibit A to their complaint, and consisted of an elaborate printed brochure captioned, "Gadsden Redevelopment." Its preparation was paid for by the Federal Government. It was the only document handed out to the general public at the time of a public hearing required by 42 U.S.C.A. § 1455 (d) to be held in connection with the redevelopment plans. At that hearing Negro citizens voiced their objections to the plans.

Mr. Wedge, Regional Director of the Urban Renewal Administration, testified:

"A. That particular brochure was submitted to our agency in connection with the planning and survey materials prepared with the benefit of the preliminary advance of funds.

"Q. All right, sir. I believe you said or did I understand you to say that this brochure here was submitted to your agency by the Greater Gadsden Housing Authority?

A. It was submitted as a part of the supporting documentation accompanying the applications."

The parts of that document upon which the plaintiff rely are quoted in the margin.³

The plaintiffs rely also on "Local Public Agency Letter No. 16" issued by the Director of

3. "Sites Selected for Redevelopment

"The Birmingham Street Site

"The Master Plan describes the Birmingham Street Area as . . . lying in the flat land at the head of Rum Branch, formerly a servants' quarters section that became pocketed by better class residential development. Lack of space for expansion led to "building between" until now these few blocks contain 250 dwellings. The area is occupied by Negroes, but the number is too few to justify provisions of proper recreational, school, and social facilities."

"The recent survey brought out, more forcefully because it was more detailed, the facts stated in the Master Plan's diagnosis: the poor quality of housing, lack of public and community facilities, and overcrowding. These conditions are in strong contrast to those of the surrounding section which, except for a small commercial center to the north, is characterized by homes of good quality.

"The opportunity to reconstitute the area as a residential district in harmony with its surroundings was the main reason for its selection as the number one redevelopment site.

"The North Fifth Street Site

"A relatively small amount of housing—standard or substandard—exists on the North Fifth Street site. This, in fact, is the principal reason for its selection as a companion project to the Birmingham Street one: it will permit redevelopment for a greater number of families than clearance of the site will displace, thus affording home sites for those occupants of the Birmingham Street site who are not eligible for relocation in public housing or who, for

the Housing and Home Finance Agency on February 2, 1953, and reading in part as follows:

"The general procedures developed in the course of actual operating experience from the joint efforts of the local and Federal agencies to assure that the living space available in a community to Negro and other racial minority families is not decreased are based upon the following:

"A slum or blighted area presently

reasons of their own, prefer single-family or duplex dwellings.

"A second important reason for selection of this area for redevelopment is the incentive it will provide for further extension of the Negro neighborhood up along the foothills of Shinbone Ridge. While some of the terrain is steep, much of it is gently rolling and well drained; this can be developed as an open residential section, convenient to school and social centers as well as to the central business district and industries of the city.

"The Projected Plans

"North Fifth Street Area

"In most Southern cities there is a scarcity of vacant land located close to schools and churches and shopping districts and served by city utilities and transportation, land that is suitable and desirable for expansion of Negro neighborhoods or creation of new ones. This is true of Gadsden.

"But sometimes careful search will reveal areas that have been overlooked or by-passed or, for some other reason, have not been exploited for this purpose. The North Fifth Street site is such an area.

"Blighted in its south part and spoiled for residential use north of Tuscaloosa Avenue by a sprawling but small industrial enterprise, this site is, nevertheless, one that offers the possibility for a new offshoot from the Tuscaloosa Avenue neighborhood. It is close to schools, churches, lodges, swimming pool, and playgrounds, as well as to the Tuscaloosa Avenue business section. It can easily be served with city utilities.

"Most importantly, it gives, to the north, onto a large open space that can be used for expansion of the small development to be created initially through this program.

"Use of Land

"North Fifth Street Area

"A feature of the plan is the four-acre site allocated to a community center; here the city will in future construct an auditorium to serve the Negro community. A small play-field to augment existing recreational facilities in the neighborhood will be provided in conjunction with the center.

"Birmingham Street Area

"Located half a mile from the central business district, the Birmingham Street section will offer spacious home sites on quiet residential streets, newly paved and serviced with utilities.

"North Fifth Street Area

"Like the Birmingham Street Area, this area is only a short distance from the central business

occupied in whole or in part by a substantial number of Negro or other racial minority families may be cleared and redeveloped if:

"1. The area is to be redeveloped as a residential area and the housing is to be available for occupancy by all racial groups (at rents or sales prices within the financial capacity of a substantial number of Negro or other racial minority families in the community), or

"2. The area is to be redeveloped as a residential area and a proportion of the housing bearing reasonable relationship to the number of dwelling units in the area which were occupied by Negro or other

district of the city. And it is equally well served with city utilities and community facilities, elementary and high schools for Negro children being less than half a mile away. The North Fifth Street Area is, in fact, virtually the only such close-in land available for expansion of the Negro community.

"Provision is made at the north extreme of the area for continuing North Fifth Street beyond this site so that the Negro neighborhood can be expanded by private developers.

"Survey Areas

"Birmingham Street Survey Area

"The core of this area is a group of squalid dwellings occupied by Negro families, some of whose grandparents undoubtedly also occupied this same old servants' quarters section. There are no schools, parks, or social facilities, but the residents have built several churches which fill an important social need as well as the religious one.

"Community Facilities

"Birmingham Street Survey Area

"Of the five churches, two serve the Negro neighborhood at Birmingham Street, the others having city-wide white congregations.

"Racial Occupancy

"While occupancy of dwelling units in the Birmingham Street Survey Area is evenly divided (323 white and 331 Negro), it is the sections of Negro occupancy—Birmingham-Bay Streets and St. John's Alley—that coincide with the sections of blighted housing.

"In the North Fifth Street Survey Area Negro families occupy about 40% of the dwellings, but the fact that so little of the area is built up leaves its future racial status still in doubt. North of Tuscaloosa Avenue only specific planning, such as is advocated in this redevelopment proposal, can forecast the future racial occupancy."

"That document also contained a colored map with 'Source: City Directory, 1952' showing 'Racial Occupancy and Home Ownership' and other maps showing the projected plans for the North 5th Street area, including a 'Proposed Colored Auditorium' and 'Playfield (Col.).'

racial minority families prior to its redevelopment is to be available for occupancy by Negro or other racial minority families, or

"3. The area is to be redeveloped as a residential area but the housing is not to be available for occupancy by all racial groups or for occupancy by Negro or other racial minority families, and:

"A. Decent, safe, and sanitary housing available for occupancy by Negro, or by other minority group, families (in an amount substantially equal to the number of dwelling units in such area which were occupied by Negro or other racial minority families prior to its redevelopment) is made available (at rents or sales prices within the financial capacity of a substantial number of Negro or other racial minority families in the community) through new construction in areas elsewhere in the community or in adequate existing housing in areas elsewhere in the community not theretofore available for occupancy by Negro or by other racial minority families, which areas are not generally less desirable than the area to be redeveloped, and

"B. Representative local leadership among Negro or other racial minority groups in the community has indicated that there is no substantial objection thereto, or . . ."

Referring to that letter, Mr. Wedge testified that: "Paragraph 3 of L.P.A. 16 has (n)ever been used or applied by the Housing and Home Finance Agency to promote any form of housing restricted to occupancy by members of the colored race."

Mr. Wedge further testified:

"Since L.P.A. Letter No. 16 contains administrative guides for reviewing one of the many aspects of an urban renewal project, the Birmingham Street Project was reviewed in the light of so-called procedure No. 3 as well as many, many other procedures and requirements of the agency."

After some understandable hesitation, both Mr. Wedge and Mr. Mills were commendably frank and candid to the effect that the plans contemplated actual segregation of the races. Mr. Wedge testified:

"Q. Then I will ask you the same question with reference to the Birmingham

Street area. It is contemplated that the Birmingham Street area when redeveloped will be available for any non-white occupancy? A. The relocation plan, as I mentioned, is the place where we have to look carefully under the provisions of 105(c) to determine the financial ability of displaced families and, therefore, North Fifth Street is a factor in the feasibility of relocation strictly from an economic point of view. With respect to the Birmingham Street, the plans in compliance with the federal law conform to the plan for the community as a whole and of the neighborhood in particular, and in that case on the basis of marketability studies and indications of probable types of development, it appeared that the land there would be substantially more costly than the land that would be provided in the North Fifth Street area. Does that answer your question?

"Q. Well, yes, sir, I think it does substantially answer it except for one minor point that I would like to get completely clear. The fact is, then, that whether it is because of economics or for whatever other reason, the Urban Renewal Administration does not contemplate that the Birmingham Street area will be available for non-white occupancy? A. We do not contemplate that."

Mr. Mills testified:

"Q. I will ask you if it is not a matter of policy, custom and usage for all housing projects in the City of Gadsden to be racially segregated? A. The projects occupied by white people are built in white areas. And the ones occupied by colored people are in the colored areas.

"All applications are received in one central office, and they are all processed by the same person, and the housing, as it becomes vacant is made available to them."

As to low rent public housing to be administered directly by the Authority, Mr. Mills testified:

"Q. You don't plan any new construction of low rent public housing? A. Oh yes.

"Q. Have you set any date? A. Some future time.

"Q. Even any date within years? A. Do you want me to answer your question?

"Q. Has any date been set within even a period of three or four years? A. No, there has been no date set, but a reservation of two hundred units has been made.

"Q. Will they be for white or colored? A. It is dependent on the need.

"Q. In any event, will they be segregated or desegregated? A. They will follow the community pattern of Gadsden, which is segregated public housing.

"Q. We come back to the same thing, if any of these plaintiffs are eligible and do, either by choice or necessity, move into a low rent housing project, it will be a segregated low rent housing project? A. Oh yes.

"Q. If it is in Gadsden. A. That is right."

Mr. Mills insisted, however, that there was no requirement of racial segregation:

"A. Of course, Mr. Burns, all the way through, in both the preliminary and the other plan there has been this anti-restrictive clause, anti-racial clause in it. And we haven't said that Negroes shall live or shall not live in either one of these areas in the redevelopment plan as adopted."

In the formally approved redevelopment plan of the Birmingham Street Area, it is provided under the heading of "Controls on Redevelopment":

"a. Redeveloper's Contracts—In addition to such conditions and requirements as the Authority may deem desirable, each contract and deed with a redeveloper shall also require:

"b. Covenants Running with the Land—Notwithstanding the provisions of any zoning or building ordinances or regulations, now or hereinafter in force, the following shall be incorporated as covenants inappropriate [sic] disposition instruments by reference to a written declaration thereof recorded simultaneously with the new plat of the Project Area. These covenants are to run with the land and shall be binding on all parties and persons claiming under them for the period of time this Redevelopment Plan is in effect, except that the Anti-Racial Covenant paragraph (2) (c) below shall run in perpetuity.

"(2) General Covenants

"(c) Anti-Racial Covenant—No covenants, agreement, lease, conveyance or other instrument shall be effected or executed by the Authority, or by the purchasers or lessees from it or any successors in interest of such purchasers or lessees, whereby land in the Project Area is restricted upon the basis of race, creed or color, in the sale, lease or occupancy thereof."

Section 106 of "Part II of Loan and Grant Contract between a Local Public Agency and the United States of America" provides in part:

"(C) General Requirements Concerning Land.—The Local Public Agency will:

"(1) Take all reasonable steps to remove or abrogate or to cause to be removed or abrogated, any and all legal enforceable provisions in any and all agreements, leases, conveyances or other instruments restricting, upon the basis of race, creed or color, the sale, lease or occupancy of any land in the Project Area which the Local Public Agency acquires as a part of the Project;

"(2) Not itself effect or execute, and will adopt effective measures to assure that there is not effected or executed by the purchasers or lessees from it (or the successors in interest of such purchasers or lessees), any agreement, lease, conveyance or other instrument whereby Project Land which is disposed of by the Local Public Agency is restricted, either by the Local Public Agency or by such purchasers, lessees or successors in interest, upon the basis of race,

creed or color, in the sale, lease or occupancy thereof;

"(H) *Obligating Redevelopers.*—When Project Land is sold or leased by the Local Public Agency, it will obligate the purchasers or lessees, as the case may be, (1) to devote such Project Land to the uses specified in the Project Redevelopment Plan; and (2) to begin and complete the building of their improvements on such Project Land within a reasonable time."

I do not consider it necessary to extend this overlong statement of the facts by referring to another printed brochure captioned "The Gadsden Plan" and shown on its flyleaf to have been "Adopted by The City Planning Commission of The City of Gadsden, Alabama—February 19, 1949." Mr. Wedge testified that the parts of that document upon which the plaintiffs rely were not considered by the Urban Renewal Administration, and Mr. Mills called attention that that document was obsolete:

"I would like for the record to show that is a publication of the City Planning Commission of the City of Gadsden, that the studies were completed in 1947, that it was adopted in January 1949, I think, prior to the passage of the Housing Act of 1949."

Further, it is not necessary to consider two items of evidence to the introduction of which the defendants objected; namely, a news release of the Housing and Home Finance Agency dated November 7, 1957, and an article from a Jackson, Mississippi, newspaper dated March 5, 1958, describing a meeting at which Mr. Mills described parts of the Gadsden redevelopment program.

HOUSING

Private Housing—New York

Matter of the Application of Edmond MARTIN to quash and vacate certain subpoenas issued by the Commission on Intergroup Relations as signed by Commissioner William Dean Embree.

Supreme Court of New York, Special Term, New York County, Part I, March 31, 1959, 188 N.Y.S.2d 566.

SUMMARY: Complaints were filed with the New York City Commission on Inter-group Relations (COIR) charging an owner and manager of certain housing accommodations with refusing to show such accommodations to colored applicants because of race or color in violation of the city's Fair Housing Practices Law [see 3 Race Rel. L. Rep. 92 (1958)]. An investigation by COIR revealed cause for the complaints. After the party complained against failed to appear at a conciliation conference he was served with a subpoena duces tecum requiring him to produce at a hearing scheduled at COIR's offices his records showing specified facts about the accommodations. He then petitioned the New York Supreme Court to quash and vacate the subpoenas on the ground that they impair his constitutional right against self-incrimination. He also challenged the impending hearing on the ground that he would be denied his constitutional right to a speedy trial. The court held that invocation of the Fifth Amendment prior to the hearing was premature, refusing as well to anticipate that other of petitioner's constitutional rights would be undermined by COIR at the hearing. The motion was denied.

JOSEPH A. GAVAGAN, Justice

The petitioner, having been charged with discriminatory renting practices in violation of the Fair Housing Practices Law of this city, appears in person and seeks to quash and vacate subpoenas issued by the Commission on Intergroup Relations (hereinafter referred to as the "Commission"), which was created to administer the local law. The subpoenas are challenged on the ground that they impair the constitutional right of the petitioner against self-incrimination and the hearing before the Commission is challenged on the ground that the petitioner will be denied his constitutional right to a speedy trial.

The material facts, although somewhat obscured by the petitioner's personal presentation, are uncontroverted. The petitioner owns or manages housing accommodations in New York City. At various times from March to September, 1958, he refused to show such housing accommodations to persons because of their race or color. On several occasions the petitioner directed the attention of colored applicants to a sign in his office which read in part as follows: "I am refusing to show apartments to negroes (sic) at present on constitutional grounds. I think the new intended regulation of the City Government is unsound and would cause trouble. In any event, it needs testing in the Courts.

*** Three complaints against the petitioner were received in August and September 1958. Investigation by the Commission revealed cause for such complaints, and the petitioner was invited by the Commission to a conciliation conference on October 16, 1958. The petitioner failed to appear for the conference. A hearing was then scheduled at the offices of the Commission for October 23, 1958, and a subpoena duces tecum was issued requiring the petitioner to produce at the hearing his records showing the housing accommodations owned or managed by him, the accommodations available for renting on the dates of the complaint and the applications received on such dates. The subpoenas could not be served on the petitioner and the hearing was adjourned from time to time for more than two months. On January 26, 1959, with the aid of a city detective, the petitioner was served with a subpoena and subpoena duces tecum which he challenges on this application.

[Authorized to Issue Subpoenas]

The Commission, among its duties, is required to receive and investigate complaints with respect to discriminatory practices in housing. To implement its investigations, Section B1-5.0(5) of the Administrative Code of the City of New York, authorizes the Commission, "To hold

hearings, compel the attendance of witnesses, administer oaths, take the testimony of any person under oath and in connection therewith to require the production of any evidence relating to any matter under investigation or in question before the commission." There can be no doubt that the Commission was duly authorized to issue the subpoenas under attack.

It is premature for the petitioner to invoke the Fifth Amendment until such time as he appears at a hearing before the Commission and is then required to respond to interrogation and to produce the records referred to in the subpoenas duces tecum. In other words, mere service of a subpoena duces tecum cannot be

equated with testifying as a witness against oneself.

This court lacks the discretion or power to anticipate that the Commission will attempt to undermine the constitutional prerogatives of any witness, including the petitioner, who appears before it. When the petitioner testifies under oath before the Commission, he shall, of course, be granted ample opportunity to plead such constitutional privileges as may be appropriate.

The other contentions of the petitioner are without merit.

The motion is accordingly denied at this time. Settle order.

HOUSING

Publicly Assisted Housing—New Jersey

LEVITT AND SONS, INCORPORATED, a New York corporation, and William J. Levitt v. **DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION**, Willie R. James and Franklin D. Todd.

GREEN FIELDS FARM, INC., A New Jersey corporation, and Robert A. Budd and Horace B. Peters v. **DIVISION AGAINST DISCRIMINATION IN THE STATE DEPARTMENT OF EDUCATION** and Yuther Gardner.

Superior Court of New Jersey, Appellate Division, July 22, 1959, 153 A.2d 700.

SUMMARY: When certain Negroes filed complaints with the New Jersey Department of Education, Division Against Discrimination, charging that defendants, corporate real estate developers of "Levittown" and of an area of "Green Fields Village", had refused to sell houses to them because of their race, contrary to the state Law Against Discrimination, the developers instituted actions in the state Superior Court challenging the asserted jurisdiction of the Division Against Discrimination. On defendants' motions, the court dismissed these actions, and plaintiffs appealed to the Superior Court's Appellate Division. The Appellate Division held that the housing in question constituted "publicly assisted housing accommodation" within the meaning of the Law Against Discrimination, as amended in 1957 [see 2 Race Rel. L. Rep. 1032 (1957)] in view of the large scale operation of FHA in connection therewith; that the Division Against Discrimination had statutory authority to enforce state laws against discrimination in housing built with public assistance pursuant to any law; that there was no federal pre-emption which would render nugatory state action forbidding racial discrimination in FHA housing; and that the 1957 amendment had not established an unreasonable system of classification. However, because of the statutory requirement that complaints of this nature "must be filed within ninety days after the alleged act of discrimination," the court also held that amended complaints adding as defendants individual officers of the defendant corpora-

tions, filed long after the 90-day period had expired, were barred. The cases against the corporate developers only were remanded to the Division Against Discrimination, the complaints therein stating a cause of action within the Division's enforcement jurisdiction.

PRICE, S.J.A.D.

The basic issue raised by these appeals is whether or not the corporate plaintiffs, Levitt and Sons, Incorporated (Levitt) and Green Fields Farm, Inc. (Green), real estate developers of "Levittown" and of an area of "Green Fields Village," respectively, are, in the operation of those developments, subject to the provisions of the "Law Against Discrimination" (N.J.S.A. 18:25-1 et seq.) which it was charged they violated. The charges of discrimination were made in amended complaints filed by respondents James, Todd and Gardner in the Department of Education of the State of New Jersey, Division Against Discrimination. It was claimed in the Levitt case that appellants refused to sell houses to defendants James and Todd because of their race and in the Green case a similar accusation was made as to defendant Gardner. Defendants James, Todd and Gardner are negroes.

[Jurisdiction Challenged]

In each of the above cases plaintiffs instituted an action in lieu of prerogative writ in the Superior Court, Law Division. In those actions plaintiffs, challenging the asserted jurisdiction of the Division Against Discrimination, contended, *inter alia*: (1) that allegations in the amended complaints in the Division that they had violated N.J.S.A. 18:25-9.1 were without foundation in that they were not charged with any substantive acts of discrimination which might properly form the basis of complaints before the administrative agency; (2) that the defendant Division was without statutory authority with reference to any housing other than public or quasi-public housing constructed in accordance with certain enumerated statutory enactments unrelated to plaintiffs' housing developments; (3) that the 1957 amendment to the Law Against Discrimination (L. 1957, c. 66, p. 128) assertedly construed by the Division, as conferring jurisdiction upon it to deal with plaintiffs' housing developments, is unconstitutional; and (4) that the cause of action against the individual plaintiffs is barred by the limitation contained in the Law Against Discrimination.

On plaintiffs' applications the court issued

orders staying proceedings in the Division Against Discrimination and directing defendants to show cause why the restraints should not be continued until after the disposition of the court actions. Thereafter the court, on defendants' motions, dismissed the complaints and dissolved the aforesaid restraints. Its action was based on its determination that it was without jurisdiction over the subject matter of the action, which jurisdiction it considered was vested in the Appellate Division, to be exercised as provided in R. R. 4:88-3(b) and because "plaintiffs have failed to exhaust their administrative remedies" before the Division. Orders reflecting the court action were entered February 19, 1959.

[Stay Order Issued]

Following plaintiffs' appeals to this court from said orders and on motions by plaintiffs for orders staying the performance and enforcement of the aforesaid orders of the trial court and staying further proceedings in the Division, we entered the following order in the Levitt case and a comparable order in the Green case:

"The Court, on its own motion, having decided to consider the within appeal also as a request by plaintiffs-appellants for leave to appeal to this Court from the setting down for hearing by defendant-respondent, Division Against Discrimination in the State Department of Education, before it the matter of the amended complaints filed by said defendants-respondents, Willie R. James and Franklin D. Todd, in the proceedings aforesaid, with leave granted for such appeal, so that the merits of the complaint filed by these plaintiffs-appellants in the Law Division of the Superior Court may be determined by this Court in this appeal;

It is, on this 10th day of March, 1959,
ORDERED:

1. The performance and enforcement of the said order entered in the Law Division of the Superior Court and the proceedings before defendant-respondent, Division Against Discrimination in the State Department of Education, be and the same are

hereby stayed pending a determination and disposition of this appeal."

Each of the aforesaid developments, in which plaintiffs are respectively engaged, involves the construction of one-family houses. The record reveals that it is planned that the Levittown development will, over a period of five to seven years, involve the construction of approximately 16,000 houses. The Green Fields Village development is divided into three parts on two of which 506 houses have been constructed and on the third of which plaintiff Green has erected 52 houses, of which "eight or nine" remained unsold at the time plaintiff Budd, president of Green, gave his deposition on December 22, 1958.

[FHA's Participation]

The record presented to us shows that the Federal Housing Administration (FHA) agreed by written "conditional commitments" to insure mortgages made by purchasers of Levittown houses to an approved lending institution. FHA issued at least 1089 such commitments. Similar arrangements were made with reference to the Green Fields Village properties, with additional undertaking by FHA that with reference to any house in the development it would insure the mortgage if the builder became the mortgagor. These commitments on the part of FHA, issued in large numbers, were called "firm commitments with additional provisions" or "operative-builder firm commitments." The evidence showed that an operative-builder firm commitment, although similar in form to a conditional commitment, covers a situation in which if the developer (operative-builder) is unsuccessful in marketing a completed house, the FHA "agrees to insure a mortgage where the operative-builder is the mortgagor * * *." However, according to deposition by Michael Albert, Director of the South Jersey District of FHA, the FHA "has not endorsed for insurance any mortgages in the name of the operative builder, that is Green Fields Farms, Inc." The procedure followed was outlined by him. Prior to the issuance of FHA mortgage commitments initial application for site approval has to be made by the "operative builder in order to determine eligibility of the site." When the site is found to be "generally acceptable" to FHA it issues a "subdivision report" designating its "requirements concerning drainage, street layouts, parks, curbs, side-

walks, utilities, including water and sewage disposal, and onsite improvements including top soil, streets, trees, driveways, entrance walks, finish grade, etc."; thereafter the builder "will arrange with an FHA Approved Mortgagee to submit individual applications for commitments to FHA." These applications are processed by the Architectural, Valuation and Mortgage Credit Sections and the Chief Underwriter's Office. Thereafter commitments are normally issued to the approved mortgagee with reference to the respective properties. Following the issuance of the conditional commitment or operative builder firm commitment the builder starts construction during the course of which FHA construction inspectors make periodic inspections. Mr. Albert testified that because of the large size of Levittown a full time FHA inspector was at the development to make inspections on the basis of schedules furnished by the builder.

"As the builder markets his houses, an application for each prospective home buyer is prepared and submitted to FHA by the Approved Mortgagee." On satisfactory credit report an "Individual Firm Commitment in the name of the applicant is issued to the Approved Mortgagee." After title closing the "Approved Mortgagee submits to the FHA" the copies of the bond and mortgage and the executed commitments, following review of which "the original bond is endorsed by FHA for mortgage insurance and returned to the mortgagee."

The record also shows that Mr. Albert testified that the FHA mortgages are available for approved loans at a rate of 5½% and for periods up to 30 years in contrast with a 5½% rate and a maximum of 20 to 25 years offered by conventional financing; that the prospective purchaser in a development such as that of plaintiffs is advised of the availability of FHA financing and furnished with a pamphlet containing information referable thereto.

[Law Against Discrimination Provisions]

The pertinent provisions of the "Law Against Discrimination" are as follows:

"N.J.S.A. 18:25-4. Employment and accommodations without discrimination; civil right

All persons shall have the opportunity to obtain employment, to obtain all the accommodations, advantages, facilities, and

privileges of any place of public accommodation and publicly assisted housing accommodation, without discrimination because of race, creed, color, national origin or ancestry, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right." (Effective June 4, 1957)

"N.J.S.A. 18:25-5. Definitions

As used in this act, unless a different meaning clearly appears from the context:

* * *

d. 'Unlawful employment practice' and 'unlawful discrimination' includes only those unlawful practices and acts specified in section 11 of this act. (N.J.S.A. 18:25-12)

* * *

k. 'A publicly assisted housing accommodation' shall include all housing built with public funds or public assistance pursuant to chapter 300 of the laws of 1949, chapter 213 of the laws of 1941, chapter 169 of the laws of 1944, chapter 303 of the laws of 1949, chapter 19 of the laws of 1938, chapter 20 of the laws of 1938, chapter 52 of the laws of 1946, and chapter 184 of the laws of 1949, and all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof."

"N.J.S.A. 18:25-6. Division against Discrimination in State Department of Education created; powers

There is created in the State Department of Education a division to be known as 'The Division Against Discrimination' with power to prevent and eliminate discrimination in employment against persons because of race, creed, color, national origin or ancestry or because of their liability for service in the armed forces of the United States, by employers, labor organizations, employment agencies or other persons and to take other actions against discrimination because of race, creed, color, national origin or ancestry or because of their liability for service in the armed forces of the United States, as herein provided; and the division created hereunder is given general jurisdiction and authority for such purposes."

"N.J.S.A. 18:25-9.1 Enforcement of laws against discrimination in houses built with public funds or assistance

The Division Against Discrimination in the State Department of Education shall enforce the laws of this State against discrimination in housing built with public funds or public assistance, pursuant to any law, because of race, religious principles, color, national origin or ancestry. The said laws shall be so enforced in the manner prescribed in the act to which this act is a supplement."

N.J.S.A. 18:25-12 to which reference is above made enumerates acts which constitute unlawful employment practice or unlawful discrimination but contains no reference to discrimination in housing of any sort.

N.J.S.A. 18:25-13 states that a person "claiming to be aggrieved by * * * an unlawful discrimination" may file a complaint against the party alleged to have committed the "unlawful discrimination complained of."

[Plaintiffs' Contentions]

Plaintiffs contend that N.J.S.A. 18:25-9.1 "does not establish any act of discrimination upon which a complaint may be founded"; that the "housing in question is not within the purview of that section"; that except "as to public or quasi-public housing, the jurisdiction of the Division Against Discrimination is limited to those acts of discrimination which are set forth in R. S. 18:25-12" and that "housing is not included in such delegated jurisdiction."

They urge that N.J.S.A. 18:25-5d limits unlawful discrimination to those acts set forth in N.J.S.A. 18:25-12 other than "those connected with public or quasi-public housing as provided for in statutes designated in R.S. 18:25-9.1" and that therefore the alleged act of discrimination is not a statutory unlawful act of discrimination; hence the statute provides no justification for such complaint as was here made before the Division.

Plaintiffs further assert that when the legislature amended the Law Against Discrimination in 1957 (L. 1957, c. 66, p. 128) making the right of access to publicly assisted housing accommodations a civil right it omitted to amend N.J.S.A. 18:25-12, the section which assertedly specifies the acts of discrimination under which the Division has jurisdiction; that while "the fail-

ure of the Legislature to have conferred upon the Division Against Discrimination, under section 11 (R.S. 18:25-12), the power argued for by the defendants herein, might have been the result of an inadvertent omission," it "may well have been intentional"; that defendants' argument that "if the court were to accept plaintiffs' position, the 1957 amendment, purporting to deal with 'publicly assisted' housing, would be futile legislation and that there would be no remedy for something which the Legislature sought to eliminate" is of no force; that it "would not be the first time that our courts have ruled that the Legislature did indeed adopt futile legislation." They cite in support of this argument *State v. Fair Lawn Service Center, Inc.*, 20 N.J. 468, 470 (1956). (However see *Gundaker Central Motors, Inc. v. Gassert*, 23 N.J. 71, 83 (1956)).

[Constitutionality Questioned]

Plaintiffs next contend that the aforesaid 1957 amendment to the Law Against Discrimination "if construed to apply to plaintiffs and the housing in question," violates the Fourteenth Amendment to the Federal Constitution and Section 1 of Article 1 of the New Jersey Constitution. They assert that Section 4 of the act (N.J.S.A. 18:25-4) "declaring it to be a civil right for all persons . . . to have the opportunity to obtain . . . the accommodations, advantages, facilities and privileges of any . . . publicly assisted housing accommodation . . ." (L. 1957, c. 66, p. 128, § 1) and the addition of the aforesaid subsection k to the definitions defining a "publicly assisted housing accommodation" to include "all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof" (L. 1957, c. 66, p. 128, § 2), impinge on federal policy.

In support of their contention plaintiffs claim that said amendments constitute "an assumption by the state legislature of the exclusive federal power to determine requirements for the receipt of benefits conferred by federal acts," and represent "the adoption of a classification system wholly foreign and unrelated to the purpose of non-discrimination sought to be achieved."

Respondent Division contends, as set forth in its brief:

"1. That the statute applies to all housing 'financed' by FHA mortgage loans, and that such housing includes not only that on which FHA has already guaranteed a mortgage, but all housing in the course of planning and construction under procedures established by FHA to qualify the development for FHA guaranteed mortgages;

2. That in any event, the statute covers all 'publicly assisted housing', and therefore includes any housing which has received material assistance in any way by operations or services of FHA;

3. That on either line of reasoning, plaintiffs' housing at Levittown and Green Fields Village, respectively, plainly falls within the scope of the law and within the enforcement powers of the Division Against Discrimination;

4. That the statute as so construed is valid and constitutional as a reasonable exercise of the police power of the State and in fulfillment of the provisions of the Constitution of New Jersey guaranteeing civil rights (N.J.S.A. 18:25-2)."

[Housing Held Publicly-Assisted]

We hold that plaintiffs' contention that the housing in question is not "publicly assisted housing accommodation" within the meaning of N.J.S.A. 18:25-4 is without merit. To hold otherwise would require us to ignore the large scale operation of FHA in connection with plaintiffs' developments, the details of which have been above outlined. It is fair to conclude from the record before us that plaintiffs would not have undertaken the developments if they had not been assured of the availability of FHA financing.

We further hold that, as N.J.S.A. 18:25-4 and N.J.S.A. 18:25-5k create and define the civil right involved, the Division is empowered by statute to "enforce the laws of this state against discrimination in housing built with public funds or public assistance, pursuant to any law." (emphasis supplied) (N.J.S.A. 18:25-9.1). We are in accord with defendants' contention that the "laws of this state" mean the laws in effect at the time of the passage of N.J.S.A. 18:25-9.1 (1954) and all laws thereafter enacted including N.J.S.A. 18:25-4 (1957). We also hold that Article 1, Section 5 of the New Jersey Constitution is a "law" of the state within the mean-

ing of N.J.S.A. 18:25-9.1 either considered by itself (*Marbury v. Madison*, 5 U.S. (1 Cranch) 138 (1803) or as implemented by N.J.S.A. 18:25-4.

We hold that plaintiffs have not shown a federal pre-emption of the field which would render nugatory state action forbidding racial discrimination in FHA housing. Neither do we find any merit in plaintiffs' contention that the 1957 amendment established "an unreasonable system of classification." See *New York State Commission v. Pelham Hall Apartments*, 10 N.Y. Misc.2d, 334, 170 N.Y. Supp. 2d 750 (Sup. Ct. 1958); 12 Rutgers L. Rev. 557 (Summer 1958).

The following philosophy pronounced in *Taylor v. Leonard*, 30 N. J. Super. 116, 121 (Ch. Div. 1954) is basic and applicable to the case at bar:

"The eventual survival of any form of government necessarily depends on the equal apportionment of the rights and privileges of citizenship as well as its obligations and duties among all its citizens irrespective of race, color or creed. Such a principle has long since been the keystone of our national and state form of government."

[Statute of Limitations Invoked]

Contention is finally made by the individual plaintiffs that action in the Division against them (who were officers of plaintiff corporations) is barred by time limitations in the statute itself (N.J.S.A. 18:25-18). The section provides that "any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination." In the Levitt case plaintiffs assert that the acts of discrimination are alleged to have occurred June 28 and June 29, 1958, and the amended complaint was filed "no earlier than October 20, 1958"; in the Green Fields case the corresponding dates are October 9, 1957 and "no earlier than September 23, 1958." They contend that an amended complaint "cannot relate back to the date of the original complaint as to new parties" and the date of filing the amended complaint is the controlling date in determining whether the action is barred by the limitation imposed.

Defendants seek to justify the amendments, as filed within time, on the following grounds (as stated in the brief of the individual respondents):

"(1) the amended complaints admittedly charge substantially the same acts as the original complaints. They merely add the officers who own or control and direct the corporations initially charged with the alleged acts of discrimination * * * (2) the said acts constituted continuing acts of discrimination up to the date of the filing of said amended complaint, it being charged in each of said amended complaints that: 'The aforesaid action of respondents (plaintiffs herein) was taken pursuant to a common and consistent scheme and plan to deny to Negroes the right to buy homes in the aforesaid development * * *' (3) the Law Against Discrimination (R.S. Cum. Supp. 18:25-16) authorizes the Commissioner or the complainant 'reasonably and fairly to amend any complaint' without limitation as to time; (4) the Commissioner, in exercising his discretion authorizing and allowing the filing of the amended complaint, deemed said amended complaint fair and reasonable, and the exercise of such discretion has not been challenged by plaintiffs in these or any other proceedings; nor have the plaintiffs charged that they suffered any loss or prejudice as a result of said amendment."

The Division further contends in its brief that the amendment is justified because R. R. 4:34, governing civil practice in the Superior Court, provides that "parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just"; that although the court rules do not govern proceedings in the Division "they furnish an appropriate guide to what is fair and reasonable. * * *"

[Statute Had Run]

We are not in accord with these contentions. As to the specific dates of alleged discrimination the 90 day period had long since expired. The fact that the allegation is made in the complaint before the Division that the action criticized "was taken pursuant to a common and consistent scheme and plan to deny to Negroes the right to buy homes in the aforesaid development" does not justify the further conclusions asserted in the Division's brief that:

" . . . Consequently, the last 'act of discrimination' within the meaning of the Law was not the particular transaction which took place in the Levitt case on June 28, 1958, or in the Green Fields case on October 9, 1957, but the prevention of the complainants from purchasing homes in the developments, and this continued right up to the date when the amended complaints were filed."

Having determined that the Law Against Discrimination applies to the housing developments undertaken by the corporate plaintiffs and, so

applied, is constitutional and valid we further hold that the complaints before the Division Against Discrimination state a cause of action within the enforcement jurisdiction of the Division.

As to the corporate appellants the stay heretofore entered is vacated to the end that the proceedings before the Division may be prosecuted as aforesaid. The complainants in the Division against appellants William J. Levitt, Robert A. Budd and Horace B. Peters are barred by the aforesaid 90 day limitation. Remanded for action not inconsistent with this opinion.

HOUSING

Publicly-Assisted Housing—Washington

IN THE MATTER OF the appeal of John J. O'MEARA and Donna A. O'Meara, his wife v. **WASHINGTON STATE BOARD AGAINST DISCRIMINATION** and Robert L. Jones, Complainant and Intervenor, Raymond D. Torbenson, Richard M. Thatcher and Seattle Real Estate Board.

Superior Court, King County, Washington, July 13, 1959, No. 535996.

SUMMARY: A Negro couple in Seattle, Washington, filed a complaint with the State Board Against Discrimination, alleging that white owners of an FHA-financed home had refused to sell property to them because of their race. The complaint was filed under an Act approved March 2, 1957 forbidding racial discrimination in the sale of "publicly-assisted housing." 2 Race Rel. L. Rep. 461, 465 (1957). The Board found that after the owners had advertised their home for sale, the Negroes had attempted to negotiate with them, but complainants' inquiries had been evaded and their bid and \$1,000 tender of earnest money refused. The Board found that respondents' subsequent sale to a white person under less favorable terms showed an intention to refuse to sell to Negroes, and that their actions amounted to an unfair practice under the statute. The white owners were therefore ordered to accept within three days the complainants' offer and tender of earnest money and not to sell to other parties in the meantime. 4 Race Rel. L. Rep. 485 (1959). The white owners, joined by the Seattle Real Estate Board and other parties, appealed the decision to the Superior Court. The court held that private action such as the sale of real estate did not fall within "state action" proscribed by the Fourteenth Amendment despite the participation of the FHA in the insurance of the loan; that the right of private property, including the sale to whomever the owner desires, was one of the purposes for which the United States government was founded; and that the classification created by the Act as to "publicly-assisted housing" was an unreasonable one and violated the privileges and immunities clause of the Washington state constitution. The order of the State Board Against Discrimination was set aside. Reproduced below are the memorandum briefs of the appellants, the memorandum of authorities as to the constitutionality of the law filed by the State Board Against Discrimination, a trial memorandum by the complainant intervenor (the original Negro plaintiff before the Board) and the memorandum opinion of the Superior Court.

Memorandum by Board

RESPONDENT'S MEMORANDUM OF AUTHORITIES REGARDING THE CONSTITUTIONALITY OF THE "CIVIL RIGHTS—LAW AGAINST DISCRIMINATION."

Comes now the respondent, the Washington State Board Against Discrimination, by and through its attorney, the Attorney General of the State of Washington, John J. O'Connell, and his assistants, Philip R. Meade, Elihu Hurwitz and Wing Luke, and in response to pre-trial conference notice that appellants are contesting the constitutionality of the "Civil Rights—Law Against Discrimination," respectfully submits this Memorandum of Authorities:

I.

The Act is presumed constitutional; the burden is on the challenger to prove otherwise.

In the case at bar, the constitutionality of the "Civil Rights—Law Against Discrimination" act, chapter 37, Laws of 1957 (cf. RCW 49.60) has been challenged. Such a challenge brings forth certain rules of statutory construction: A statute is presumed constitutional; every reasonable intentment will be indulged in in favor of the construction that it is in conformity with the constitution; if a reasonable doubt appears, it should be resolved in favor of the validity of the law; every law is presumed to be enacted for the public welfare; the burden is on the challenger to prove that a law is unconstitutional; a statute cannot be judicially declared beyond the power of the legislature to enact it unless it conflicts with some specific or definite provisions of the constitution; for the legislature may legally enact any law not expressly or inferentially prohibited by the state or federal constitutions, the state constitution being a limitation, not a grant, on the power of the legislature, which is otherwise omnipotent. *Gruen v. State Tax Commission*, 35 Wn. (2d) 1, 211 P.2d 651 (1949); *State ex rel. Troy v. Martin*, 38 Wn. (2d) 501, 230 P.2d 601 (1951); *Frach v. Schoettler*, 46 Wn. (2d) 281, 280 P.2d 1038 (1955), cert. denied 76 S.Ct. 75, 350 U.S. 838, 100 L.Ed. 747 (1955); *Port of Tacoma v. Parosa*, 52 Wn. (2d) 181, 324 P.2d 438 (1958).

Of course, these rules set forth in the cases cited are now basic; nevertheless, the principles

and rationale from which they are derived are so fundamental to our republican form of government that such should be reflected upon each time a law is challenged as to its constitutionality. On this, the opinion of Judge Dunbar in *Ah Lim v. Territory*, 1 Wash. 156, 158 (1890), is classic, reading in part:

"The duty of passing upon the constitutionality of a law should be approached by the court with the utmost caution, and demands the most solemn, thoughtful and painstaking consideration. And in view of the consequences to society from the annulling of laws made by the representatives of the people, and presumed to have been enacted in response to the express desire of the people, it becomes the gravest question with which courts have to deal; and we believe it has been the uniform conviction of the courts that they ought not, and cannot in justice to a coordinate department of the state government, declare a law to be void without a strong and earnest conviction, divested of all reasonable doubt, of its validity.

"The following quotation from an opinion rendered by Chief Justice MARSHALL in the case of *Fletcher v. Pack*, 6 Cranch 87, commends itself to our approbation as resting upon sound principles of propriety and right. Said the judge: 'The question whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.'

"... This is the especial function of the legislature, and, in the investigation of legislative power, courts have nothing to do with questions of policy or expediency, for as a learned author says: 'The constitution has created the legislature and the judicial departments; the one to make law, the other

to construe and administer it. *It may be mischievous in its efforts, burdensome upon the people, conflict with our conceptions of natural right, abstract justice, or pure morality, and of doubtful propriety in numerous respects, and yet we would not be justified to hold that it was not within the scope of legislative authority for such reason; and, as has been well said by Mr. Cooley in his work on Constitutional Limitations: "It must be evident to any one that the power to declare a legislative enactment void, is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising, in any case where he can conscientiously and with due regard to duty and official oath, decline the responsibility." The legislative and judicial are coordinate departments of the government, of equal dignity; each alike is supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it.*

"... The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. . . . No law can be pronounced invalid, for the reason simply, that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the state, it is not justified by public necessity, or designed to promote the public welfare."

"The remedy for unjust or unwise legislation not obnoxious to constitutional objections, is to be found in a change by the people of their representatives according to the methods provided by the constitution." (Emphasis supplied.)

II.

The "Civil Rights—Law Against Discrimination" effectuates the fundamental principles of the free and democratic State of Washington.

Section 1, chapter 37, Laws of 1957 (cf. RCW 49.60.010) provides:

"Section 1, chapter 183, Laws of 1949 and RCW 49.60.010 are each amended to read as follows:

"This chapter shall be known as the 'Law Against Discrimination.' It is an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in places of public resort, accommodation or amusement, and in publicly-assisted housing because of race, creed, color, or national origin; and the board established hereunder is hereby given general jurisdiction and power for such purposes." (Emphasis supplied.)

Section 3, chapter 37, Laws of 1957 (cf. RCW 49.60.030) provides:

"Section 2, chapter 183, Laws of 1949 and RCW 49.60.030 are each amended to read as follows:

"The right to be free from discrimination because of race, creed, color, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

"(1) The right to obtain and hold employment without discrimination;

"(2) The right to the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement;

"(3) The right to secure publicly-assisted housing without discrimination." (Emphasis supplied.)

The Constitution of the State of Washington provides, in part:

"PREAMBLE

"We the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

"ARTICLE I—DECLARATION OF RIGHTS

"Section 1. Political Power—All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

"Sec. 2. Supreme Law of the Land—The Constitution of the United States is the supreme law of the land.

"Sec. 3. Personal Rights—No person shall be deprived of life, liberty, or property, without due process of law.

"Sec. 12. Special Privileges and Immunities Prohibited—No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

"Sec. 32. Fundamental Principles—A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." (Emphasis supplied.)

Speaking of the constitutional provision last quoted, Article I, Sec. 32, the Supreme Court has said:

"This is not in any sense an inhibition on legislative power. Clearly, it is but an admonition not only to the legislature but also to the courts to keep constantly in mind the fundamentals of our republican form of government—among others, the cleavage between the legislative and the judicial powers. . . ." *Wheeler School Dist. v. Hawley*, 18 Wn. (2d) 37, 48, 137 P.2d 1010 (1943). (Emphasis supplied.)

When reading Article I, Sec. 32, together with the Enabling Act, it seems certain that other fundamental principles must be those set forth in Sec. 4 of the Enabling Act, which reads, in pertinent part:

"... The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. . . ." 25 U.S. Statutes at large, c. 180, p. 676. (Emphasis supplied.)

The Constitution of the United States reads, in part, as follows:

"PREAMBLE

"We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." (Emphasis supplied.)

"AMENDMENT XIV (1868)

"Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis supplied.)

Speaking of the Federal Constitution provision last quoted and of Article I, Sec. 12, Washington Constitution, above, the Washington Supreme Court has said:

"The aim and purpose of the special privileges and immunities provision of Art. I, § 12, of the state constitution and of the equal protection clause of the fourteenth amendment of the Federal constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other. . . ." (Emphasis supplied.) *State ex rel. Nor. P. R. Co. v. Henneford*, 3 Wn. (2d) 48, 54, 99 P.2d 616 (1940).

And, of course, nothing is more fundamental than the cherished aim of American Democracy expressed in the Declaration of Independence:

"... The first official action of this nation declared the foundation of government in these words: *'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.'* While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S. 150, 159, 41 L.Ed. 666, 670 (1896). (Emphasis supplied.)

Against this backdrop of fundamental principles, the purpose, the legislative intent of the "Civil Rights—Law Against Discrimination" is manifest—to give force to, to effectuate these principles where they are denied.

Against this backdrop of fundamental principles, the declaration of the New York Court, in a decision upholding the constitutionality of a similar statute, gains full meaning:

"The private ownership of private property, free of unreasonable restriction upon the control thereof, is truly a part of our way of life, but on the other hand, we as a People do hold firmly to the philosophy that all men are created equal. Indeed, discrimination against any individual here on account of race, color or religion is antagonistic to fundamental tenets of our form of government and of the God in whom we place our trust." *New York State Commission v. Pelham Hall Apts.*, 170 N.Y. S.2d 750, 757 (1958). (Emphasis supplied.)

III.

The effectuation of the fundamental principles is a proper matter for the exercise of the police power.

By section 1, chapter 37, Laws of 1957 (cf. RCW 49.60.010), set forth above, it is expressly stated that the legislature intended that the "Civil Rights—Law Against Discrimination" have its foundation in the police power of the state. Regarding this power, the Supreme Court has said:

"... This it does under the police power: *'the power inherent in every sovereignty ... the power to govern men and things.'*

"It is unnecessary to discuss the origin, nature or extent of this power. It is sufficient to say that, by means of it, the legislature exercises a supervision over matters affecting the commonweal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it, the state may 'prescribe regulations promoting the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity.' In fine, when reduced to its ultimate and final analysis, the police power is the power to govern. It is not meant here to be asserted that this power is above the constitution, or that everything done in the name of the police power is lawfully done. It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the state, and is not in violation of any direct and positive mandate of the constitution. The clause of the constitution now under consideration was intended to prevent the arbitrary exercise of power, or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society. In other words, the test of a police regulation, when measured by this clause of the constitution, is reason-

ableness, as contradistinguished from arbitrary or capricious action. (pp. 177, 178)

"So, in *Noble State Bank v. Haskell*, supra, Mr. Justice Holmes said:

"It may be said in a general way that the police power extends to all the great public needs. . . ." (p. 187)

"The supreme court of the United States in *Sentell v. New Orleans etc. R. Co.*, 166 U.S. 698, speaking of the power of the state to interfere with private property, used this language:

"That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits and vegetables do not cease to become private property by their decay; but it is clearly within the power of the state to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass."

"The power to regulate, therefore, applies alike to all employments. The test of the power is found in the effect the pursuit of the calling has upon the public weal, rather than in the inherent nature of the calling itself.

"In *Allgeyer v. Louisiana*, 165 U.S. 578, the court, referring to the fourteenth amendment to the constitution of the United States, said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work

where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

"It is thought the act at bar interferes with certain of the personal rights here defined, particularly with the right of contract, and is for that reason violative of this provision of the constitution. But it is recognized in the case cited, and in many others, that these rights are not absolute. On the contrary, it has been many times said that there is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses; that the term liberty means absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. . . ." (pp. 191, 192, 193.)

"If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights.

"That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. . . ." *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101 (1911) (p. 195) (Emphasis supplied.)

And in the case of *State v. Mountain Timber Co.*, 75 Wash. 581, 587, 135 P. 645 (1913), the court said:

"The police power of the state is more than an attribute of sovereignty. It, like the power of taxation, is an essential element of government, and exists in every state without express declaration and without limitation, in so far as it is made to apply to the health, peace, comfort, and morals of the

people. Formerly applied strictly and directly, it has now, because of changed economic conditions, come to be more favored, and is frequently relied upon to sustain laws which but indirectly affect the common good.' State ex rel. Webster v. Superior Court.

"The police power which may be invoked to protect the health, property, welfare, and morals of citizens is an inherent attribute of sovereignty, the exercise of which is necessary to secure good government and promote the public welfare. Circumstances and occasions calling for its exercise have multiplied with marvelous rapidity in recent years, by reason of the well-recognized fact that modern, social and economic conditions have called into existence agencies previously unknown; many of which so vitally affect the health and physical condition of laborers, especially female laborers, that legislation of the character here involved has been sustained with greater liberality than was formerly evinced under less exacting conditions.' State v. Somerville.

"It will be seen that what was originally a rule of inclusion and of exclusion and incapable of exact definition, has developed into a rule of most frequent inclusion. From the peace of the community and the suppression of nuisances, we have undertaken to regulate things hitherto considered private.

"To illustrate: We have held that the legislature may enact laws for the promotion of health; provide for the marketing of food products; prevent fraud in the disposition and sale of goods; prevent the doing of certain work and the pursuit of certain occupations upon the Sabbath day; regulate certain trades, businesses and professions; limit the hours of labor upon public works, and fix hours of labor for women; enact drainage laws and fill low lands where drainage is impractical. These are a part, only, of the subjects touching private affairs treated under the police power and sustained as needful and proper regulations. Moreover, it has been held that there may be a legal liability without fault and that crimes may be committed without intent.

"Having in mind the sovereignty of the state, it would be folly to define the term.

To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The police power is to the public what the law of necessity is to the individual. It is comprehended in the *maxim salus populi suprema lex*. It is not a rule, it is an evolution." (pp. 587, 588) (Emphasis supplied.)

In *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615 (1936), the court said:

"However difficult it may be to give a precise or satisfactory definition of 'police power,' there is no doubt that the state, in the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order and welfare of the people. Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution. *Bowes v. Aberdeen*, 58 Wash. 535, 542, 109 P. 369, 30 L.R.A. (N.S.) 709; State ex rel. *Davis-Smith Co. v. Clausen*, 65 Wash. 156, 178 117 P. 1101, 37 L.R.A. (N.S.) 466; State ex rel. *Webster v. Superior Court*, 67 Wash. 37, 40, 120 P. 861, L.R.A. 1915C, 287, Ann. Cas. 1913D, 78; State v. *Mountain Timber Co.*, 75 Wash. 581, 584, 135 P. 645, L.R.A. 1917D, 10, affirmed in *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann. Cas. 1917D, 642.

"While, formerly, the power was viewed as one of strict and direct application, it has now come to be more favored on account of changed and changing economic and social conditions, and at present is frequently relied on to sustain laws which affect the common good in only an indirect way. State ex rel. *Webster v. Superior Court*, 67 Wash. 37, 40, 120 P. 861, L.R.A. 1915C, 287, Ann. Cas. 1913D, 78. A large discretion is therefore vested in the legislature to determine what the public interest demands and what measures are necessary to secure and protect the same. State v.

Somerville, 67 Wash. 638, 641, 122 P. 324.

"In determining whether a law comes within the police power of the state, it is not incumbent upon the court to find that facts which would justify such legislation actually exist. *If a state of facts which would justify the legislation can reasonably be conceived to exist, the court must presume that it did exist and that the law was passed for that purpose.* State v. Pitney, 79 Wash. 608, 612, 140 P. 918, Ann. Cas. 1916A, 209; Tacoma v. Fox, 158 Wash. 325, 331, 290 P.2d 1010; Spokane v. Latham, 181 Wash. 161, 163, 42 P.2d 427." (pp. 153, 154) (Emphasis supplied.)

See also Frach v. Schoettler, supra, 46 Wn. (2d) 281, 280 P.2d 1038 (1955), and cases cited; Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957).

Regarding the police power, Day-Brite Lighting v. Missouri, 342 U.S. 421, 96 L.Ed. 469, 72 S.Ct. 405 (1951), echoes the foregoing:

"... Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislature power has limits as Tot v. United States, 319 U.S. 463, 87 L.Ed. 1519, 63 S.Ct. 1241, holds. *But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.* That is the essence of West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578, 108 ALR 1330; Nebbia v. New York, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505, 89 A.L.R. 1469; Olsen v. Nebraska, 313 U.S. 236, 85 L.Ed. 1305, 61 S.Ct. 862, 133 A.L.R. 1500; Lincoln Federal Labor Union, A.F.L. v. Northwestern Iron & Metal Co. 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251, 260, 267, 6 A.L.R.2d 473; and California State Auto. Asso. Inter-Insurance Bureau v. Maloney, 341 U.S. 105, 95 L.Ed. 788, 71 S.Ct. 601.

"... The public welfare is a broad and inclusive concept. The moral, social, econo-

mic, and physical well-being of the community is one part of it; the political well-being, another. . . ." (96 L.Ed. 472, 473) (Emphasis supplied.)

Now then, under the rule quoted above from Shea v. Olson, supra, 185 Wash. 143, 53 P.2d 615 (1936), can it be reasonably conceived that facts could exist which would justify the legislation in question, which would justify the declaration and findings that "practices of discrimination are a matter of state concern, that such discrimination threatens not only the rights and privileges of its inhabitants but menaces the institutions and foundations of a free democratic state."

It does not tax the reasoning power to conceive that there could exist forces and practices which seek to undermine and destroy not only the fundamental principles discussed above, but all those upon which this Republic is formed; nor does it tax the reasoning power to conceive that some of these practices could be discrimination based on race, creed or color. Indeed, it can hardly be controverted that such is conceivable when it is a matter of common knowledge that such does, in fact, exist in public accommodations, in education, in employment and in countless other areas including publicly-assisted housing.

The court may take judicial notice of the facts which are common knowledge:

"... Courts in passing upon the reasonableness or unreasonableness of a statute, and deciding whether the legislature has exceeded its powers to such an extent as to render the act invalid, *must look at the terms of the act itself, and bring to their assistance such scientific, economic, physical, and other pertinent facts as are common knowledge and of which they can take judicial notice.*" State v. Somerville, 67 Wash. 638, 641, 122 P. 324 (1912). (Emphasis supplied.)

"Since judicial cognizance may extend to matters beyond the actual knowledge of the judge, the judge, in ascertaining facts to be judicially noticed may resort to or obtain information from any source of knowledge which he feels would be helpful to him, always seeking that which is most appropriate. When the matter is a proper subject of judicial knowledge, the judge, in order to attain mental certainty, may re-

quire the assistance of the party who invoked his judicial knowledge, he may investigate the matter for himself, or he may pursue both courses. The scope, direction, and details of such investigation are entirely within the discretion and under the direction of the judge, uncontrolled by the rules of evidence or the wishes or suggestions of the parties; but it is the duty of the judge to pursue inquiries sufficient to make his knowledge real as far as possible, since it is just as much an error for the court to mistake a fact of which it has taken cognizance as to mistake a principle of law. *The judge may refer to properly authenticated public official documents or records of all kinds, to dictionaries, encyclopedias, geographies, or other books or periodicals or public addresses. He may even inquire of others.* Where the judge is in doubt as to the sovereign character of a party, or as to the recognition by our government of a foreign government, he may call on the executive, particularly the department of state, for the necessary information." 31 C.J.S., Evidence, § 12, p. 516 (Emphasis supplied.)

Sources for these facts of common knowledge are listed in footnote 11 of the celebrated case of *Brown v. Board of Education of Topeka*, 374 U.S. 487, 98 L.Ed. 873, 74 S. Ct. 686, 38 A.L.R.2d 1180 (1953), and in the bibliography attached to this brief.

As has been noted previously, the only limitation in the police power is "that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct mandate of the constitution." *Frach v. Schoettler*, supra, 46 Wn. (2d) 281, 280 P.2d 1038 (1955), and cases cited.

For the sake of convenience and clarity, it seems advisable to consider this limitation in two phases:

(1) Does the legislation promote some interest of the state or correct some evil? and

(2) Does it violate any direct mandate of the constitution?

(1) The statute in question expressly declares that it is an exercise of the police power "in fulfillment of the provisions of the constitution of this state concerning civil rights." Section 1, chapter 37, Laws of 1957 (cf. RCW 49.60.010),

set forth above. Bearing in mind the fundamental principles discussed hereinbefore, it cannot be denied that this "fulfillment" promotes some interest of the state; nor can it be denied that the denial of these fundamental principles is an evil to our concept of a free and democratic republic.

That the protection of fundamentals is within the ambit of the police power is settled by *Day-Brite Lighting v. Missouri*, supra, 342 U.S. 421, 96 L.Ed. 469, 472, 72 S.Ct. 405 (1951), referenced and quoted from above, wherein it was said:

"... Here it is not the protection of the health and morals of the citizen. Missouri by this legislation has sought to safeguard the right of suffrage by taking from employers the incentive and power to use their leverage over employees to influence the vote. But the police power is not confined to a narrow category; it extends, as stated in *Nobel State Bank v. Haskell*, 219 U.S. 104, 111, 55 L.Ed. 112, 116, 31 S.Ct. 186, 32 L.R.A. N.S. 1062, Ann. Cas. 1912A 487, to all the great public needs. The protection of the right of suffrage under our scheme of things is basic and fundamental." (Emphasis supplied.)

Clearly, this "fulfillment," this protection or effectuation of fundamental principles, this promotion of "some interest of the state," is enough to meet one requisite of the limitation of police power. But perhaps it should also be noted that the same statutory provision, last referenced, also declares that it is for "the public welfare, health and peace."

By taking judicial notice of facts of common knowledge, as set forth in the sources referenced above, those cited in the *Brown* case and those cited in the attached bibliography, it is readily revealed that racial discrimination has created both a physical and mental health problem, which is indeed an evil to be corrected. Likewise, it is apparent that discrimination imperils peace and good order.

(2) Next, let us turn to the other requisite of the limitation, that the legislation must not violate any direct or positive mandate of the constitution.

Certainly there is no express or implied specific, direct or positive mandate of the Washington or Federal Constitution imposing discrimination. It cannot be contended that the

law in question violates the concepts of due process and equal protection for it is settled that such are not even applicable to legislation enacted pursuant to the police power. Indeed, it appears settled that, in this country, government could not divest itself of the power to provide for these things encompassed by the police power.

In *Shea v. Olson*, supra, 185 Wash. 143, 153, 53 P.2d 615 (1936), Judge Steinert, speaking for the court, said:

"We next consider the provisions of Art. I, §§ 3 and 12 of the state constitution and the fourteenth amendment of the United States constitution, relating to due process and the equal protection of the laws.

"None of these constitutional provisions apply to laws enacted by a state legislature in the exercise of its police power. We have repeatedly so held. *Fisher Flouring Mills Co. v. Brown*, 109 Wash. 680, 692, 187 P. 399; *State ex rel. Lane v. Fleming*, 129 Wash. 646, 648, 225 P. 647, 34 A.L.R. 500; *Seattle v. Gervasi*, 144 Wash. 429, 432, 258 P. 328. See, also, *Powell v. Pennsylvania*, 127 U.S. 678, 8 S.Ct. 992, 1257, 32 L.Ed. 253." (Emphasis supplied.)

See also *Frach v. Schoettler*, supra, 46 Wn. (2d) 281, 280 P.2d 1038 (1955).

In *State ex rel. Lane v. Fleming*, 129 Wash. 646, 648, 225 P. 647 (1924), the court said:

"... If the section of the ordinance referred to is a proper exercise of the police power its constitutionality can hardly be denied. Indeed, the provisions of the Federal and state constitutions relied on do not apply to legislative enactments in the exercise of the police power. *Powell v. Pennsylvania*, 127 U.S. 678; *Fisher Flouring Mills Co. v. Brown*, 109 Wash. 680, 187 Pac. 399. This upon the theory, as stated in the *Powell* case, that organized government cannot divest itself of the power to provide for those things essential in the legitimate exercise of the police power." (Emphasis supplied.)

In *Powell v. Pennsylvania*, 127 U.S. 678, 32 L.Ed. 253, 256 (1888), the United States Supreme Court said:

"It is scarcely necessary to say that if this statute is a legitimate exercise of the police

power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler v. Kansas*, 123 U.S. 663 [31:211]; *Butchers' Union, S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U.S. 746, 751 [28:585, 587]; *Barbier v. Connolly*, 113 U.S. 27 [28:923]; *Yick Wo v. Hopkins*, 118 U.S. 356 [30:220]. (Emphasis supplied.) (Brackets not supplied.)

And in *Mugler v. Kansas*, 123 U.S. 623, 31 L.Ed. 205, 211 (1887), Justice Harlan, speaking for the court, said:

"This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile state legislation, this court in *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. Co.* 111 U.S. 751 [28:587], said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone v. Mississippi*, 101 U.S. 816 [25:1079], where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: 'No Legislature can bargain away the public health, or the public morals. The people themselves cannot do it, must less their servants. *** Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.'

"Again, in *New Orleans Gas Light Co. v. Louisiana Light Co.* 115 U.S. 650, 672 [29. 516, 524]: The constitutional prohibition upon state laws impairing the obligation

of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.

"The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle,—equally vital, because essential to the peace and safety of society,—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . ." (Emphasis supplied.) (Brackets not supplied.)

Likewise, the preservation, the protection, the "fulfillment" and effectuation of the fundamental principles discussed previously is essential and thereby a proper matter for the exercise of the police power.

IV.

The law is a proper exercise of the police power.

Having established that the prevention of discrimination is a proper object for the exercise of the police power, we must next determine whether or not the instant law is actually an exercise of that power:

"The same court in the case of City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784, uses this language:

"The police power, however, has constitutional limits, and any measure enacted or adopted in its exercise, to be sustained, must bear some reasonable relation to the purposes for which the power may be exercised. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private rights. The legislative determination as to what is

a proper exercise of the police power is not conclusive, but is subject to review by the courts. [Authorities.] If the means employed have no real, substantial relation to public objects within the state's power, or if those means are arbitrary and unreasonable, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. [Authorities.]"

" . . .

"The rule is fairly stated in 43 C. J. 227, as follows:

"In order that a municipal regulation may be sustained as an exercise of the police power, the regulation must have for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare. The exercise of the police power must have a substantial basis. The power cannot be made a mere pretext for legislation that does not fall within it. There must be some clear, real, and substantial connection between the assumed purpose of the regulation and the active provisions thereof, and the provisions must in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised." Brown v. Seattle, 150 Wash. 203, 212, 272 P. 517 (1928). (Emphasis supplied.)

Apparently, this is what is meant by the court's declaration that police power legislation must "reasonably tend" to correct an evil or promote some interest of the state.

Accordingly, let us consider the active provisions of the law to see if the means employed have a substantial relationship to objects within the police power, that is, whether or not the active provisions of the law plainly tend to prevent discrimination and if the means employed are reasonable rather than arbitrary and capricious.

[Discrimination Defined]

In essence, the law makes it an unfair practice to discriminate against any person because of race, creed, color or national origin in respect to employment, public accommodations, and

publicly-assisted housing. Any person claiming to be aggrieved by an alleged unfair practice may file a complaint with the administrative board established by the act. The board is charged with the duty of investigating the complaint and if an unfair practice is found, with the duty of endeavoring to eliminate said unfair practice by conference, conciliation and persuasion. This failing, the board is charged with the duty of referring the matter to a hearing tribunal. Then, this quasi-judicial tribunal conducts a hearing, and if it finds that an unfair practice has been committed, it is charged with the duty of issuing a cease and desist order and to take such other action as necessary to effectuate the law. Chapter 37, Laws of 1957 (cf. RCW 49.60).

Obviously, the means employed in the instant act, the method for preventing discrimination, is patterned after the National Labor Relations Act. It is also similar to the procedure followed in the State Unfair Practices Act (RCW 19.90) and the State Fair Trade Act (RCW 19.89). All three of these acts from which the instant law is patterned have been upheld when challenged as to their constitutionality. *National Labor Relations Board v. Jones & L. Steel Corp.*, 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615, 108 A.L.R. 1352 (1937); *State v. Sears*, 4 Wn. (2d) 200, 103 P.2d 337 (1940); *Sears v. Western Thrift Store*, 10 Wn. (2d) 372, 116 P.2d 756 (1941).

Obviously, the means strikes directly at the heart of an object clearly within the police power, the prevention of discrimination. This being so, then, of course, there is a substantial relationship between the means and the object of the power.

Then, we are left only with the question of whether the law at hand is reasonable or whether it is arbitrary.

["Arbitrary" Defined]

The term arbitrary means despotic, absolute, capricious, whimsical, and irresponsible. Webster's New International Dictionary of the English Language (1924), p. 15; Black's Law Dictionary (4th Ed.), p. 134. In the case of *In re St. Paul & Tacoma Lumber Co.*, 7 Wn. (2d) 580, 592, 110 P.2d 877 (1941), the court defined the terms arbitrary and capricious thusly:

"We have defined the terms 'arbitrary and capricious' in the following language:

"These terms, when used in this connection, must mean wilful and unreasoning action, action without consideration and in disregard of the facts and circumstances of the case. Action is not arbitrary or capricious when exercised honestly and upon due consideration where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached." *Sweitzer v. Industrial Ins. Commission*, 116 Wash. 398, 199 P. 724."

This momentary pause to consider the meaning of the term arbitrary manifests the graveness of a charge or ruling that any law is unconstitutional because arbitrary.

It is incontrovertible that the law is reasonable in terms of procedure; for it provides for notice, hearing, representation by counsel and a right of review to the superior and supreme courts. The record now before the court readily reveals compliance with these requirements.

But is the law reasonable in terms of substance? What does it require—only that we, the people, not discriminate against our fellow man because of race, creed, color or national origin. Certainly this is much less than practices approved in other cases testing the constitutionality of police power legislation. In the landmark case of *State ex rel. Davis-Smith Co. v. Clausen*, supra, 65 Wash. 156, 117 P. 1101 (1911), the court upheld the Workmen's Compensation Law even though it may incidentally deprive "some person of his property without fault or take property of one person to pay the obligation of another." In *State v. Campbell*, 12 Wn. (2d) 459, 122 P.2d 458 (1942), the court upheld the state law regulating the practice of dentistry even though it deprives a person of the right he might otherwise enjoy to gain a livelihood. And, of course, the validity of zoning regulations is well established, whereby property owners are restricted to the manner in which they may use their property.

Is it despotic, whimsical and irresponsible for the legislature, the chosen representatives of the people, to require us to follow the fundamental concepts of a free and democratic state, to follow the precepts of Christian morality? Is it despotic, whimsical and irresponsible to enact legislation to alleviate the physical and mental health problem arising from such discrimination?

[Concerned With Housing]

In the case at bar, we are concerned with the provisions of the law dealing with discrimination with respect to publicly-assisted housing. It may be contended that the law is arbitrary because it applies only to publicly-assisted housing—rather than all housing.

It is, of course, basic that neither the Federal Government nor the states shall make any law respecting the establishment of religion or prohibiting the free exercise thereof. See *State ex rel. Bolling v. Superior Court*, 16 Wn. (2d) 373, 133 P.2d 803 (1943). And it has long been settled that the Federal Constitution prohibits, in so far as civil and political rights are concerned, discrimination by the Federal or state governments because of race. See *Cooper v. Aaron*, — U.S. —, 3 L.Ed.2d 1, 79 S.Ct. — (1958); *Bolling v. Sharpe*, 347 U.S. 497, 98 L. ed. 884, 74 S. Ct. 693 (1953). See also *Banks v. Housing Authority*, 120 Cal. App. (2d) 1, 260 P. (2d) 668 (1953), certiorari denied 347 U.S. 974, 98 L. ed. 1114 (1953), and cases cited. Moreover, these prohibitions extend to those corporations or organizations which exercise governmental powers or receive governmental funds to such an extent as to be considered agents of government. See *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192, 89 L.Ed. 173 (1944); *Marsh v. Alabama*, 326 U.S. 501, 90 L.Ed. 285 (1946); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. Ct. App., 1945), certiorari denied 326 U.S. 721, 90 L.Ed. 427 (1945). Compare *Ming v. Horgan* (Cal. Superior Court) 3 Race Rel. L. Rep. 693, wherein the court found that FHA financing of housing likewise creates the requisite governmental relationship.

Then can it be said that the instant law is despotic, whimsical and irresponsible because the legislature has precluded those who have received public assistance, the use of public money, from doing that which the government itself cannot do with that money?

There is, however, a further reason why the law should not be determined arbitrary. We have noted the rule that if any state of facts reasonably can be conceived to sustain the legislation, then the existence of such facts must be assumed. *Shea v. Olson*, supra, 185 Wash. 143, 53 P.2d 615 (1936). The rule is likewise in determining if classification is reasonable. *State v. Kitsap County Bank*, 10 Wn. (2d) 520, 117

P.2d 228 (1941). Clearly, it is conceivable that the legislature could have found that discrimination with respect to publicly-assisted housing was the more serious evil needing correction. In this determination the legislature has wide discretion; the relative need, no less than the existence of evil, is a matter of legislative rather than judicial judgment. *West Coast Hotel Co. v. Parrish*, 300 U.S., 379, 81 L.Ed. 703 (1936), affirming 185 Wash. 581, 55 P.2d 1083.

We are not unmindful of the court's statement in *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed. 940, 950, 54 S.Ct. 505, 89 A.L.R. 1469 (1934):

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

"The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

"The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community. The state may control the use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location, or their use for certain kinds of advertising; may in certain circumstances authorize encroachments by party walls in cities; may fix the height of buildings, the character of materials, and methods of construction; the adjoining area which must be left open; and may exclude from residential

sections offensive trades, industries and structures likely injuriously to affect the public health or safety; or may establish zones within which certain types of buildings or businesses are permitted and others excluded. And although the Fourteenth Amendment extends protection to aliens as well as citizens, a state may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land.

"Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process. *These measures not only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights.*" 78 L.Ed. 950. (Emphasis supplied.)

But we have seen that due process and equal protection is not applicable to police power legislation. The requirements the court speaks of are the requirements of police power legislation, not due process.

We are also mindful of the fact that in *State ex rel. Davis-Smith Co. v. Clausen*, supra, 65 Wash. 156, 117 Pac. 1101 (1911); *Garretson Co. v. Robinson*, 178 Wash. 601, 35 P.2d 504 (1934); *State v. Sears*, 4 Wn. (2d) 200, 103 P.2d 337 (1940); and *Campbell v. State*, 12 Wn. (2d) 459, 122 P.2d 458 (1942), the court considered the due process and equal protection concepts in determining the validity of police power legislation. But examination of these cases reveals that therein the court was merely answering the contentions raised by counsel.

In any event, the instant law is consistent with the requirements of due process and equal protection.

The Washington Supreme Court has repeatedly held that the provisions of the Federal and Washington Constitutions relative to due process and equal protection are substantially identical and has repeatedly disposed of them as one and the same. See *Texas Company v. Cohn*, 8 Wn. (2d) 360, 112 P.2d 522 (1941). Accordingly, they will be considered here likewise.

A. The law is consistent with the requirements of procedural due process.

"The essential elements of the constitutional guarantee of due process, in its procedural aspect, are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case. In *re Hendrickson*, 12 Wn. (2d) 600, 123 P.2d 322, 12 Am.Jur. 267, Constitutional Law, § 573." Senior Cit. L. v. Dept. Soc. Sec., 38 Wn. (2d) 142, 168, 228 P.2d 478 (1951). See also *In re Petrie*, 40 Wn. (2d) 809, 246 P.2d 465 (1952), and cases cited.

The law now challenged provides for notice, an opportunity to be heard before an administrative tribunal and a right of review to the superior and supreme courts. Sections 18, 21 and 22, chapter 37, Laws of 1957 (cf. RCW 49.60.250, RCW 49.60.260 and RCW 49.60.270). The record of the proceedings before the hearing tribunal is now before the court and readily reveals that notice was given, that a hearing was held and that the parties were represented by counsel.

B. The law is consistent with the requirements of substantive due process.

Sec. 3, chapter 37, Laws of 1957 (cf. RCW 49.60.030), supra, provides:

"Section 2, chapter 183, Laws of 1949 and RCW 49.60.030 are each amended to read as follows:

"The right to be free from discrimination because of race, creed, color, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

"(1) The right to obtain and hold employment without discrimination;

"(2) The right to the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement;

"(3) The right to secure publicly-assisted housing without discrimination."

In *Railway Mail Association v. Corsi*, 326 U.S. 88, 89 L.Ed. 2072, 2076 (1945), Justice Reed, speaking for the majority, said:

"Appellant first contends that § 43 and related §§ 41 and 45 of the New York Civil Rights Law, as applied to appellant offends the due process clause of the Fourteenth Amendment as an interference with its right of selection to membership and abridgement

of its property rights and liberty of contract. We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees." (Emphasis supplied.)

And therein Justice Frankfurter in a concurring opinion declared (89 L.Ed. 2079):

"Apart from other objections, which are too unsubstantial to require consideration, it is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts." (Emphasis supplied.)

In view of this pronouncement by the court and of what has been said hereinbefore regarding the extent of the police power, it seems fair to conclude that there is no doubt but what the state can protect its citizens from such discrimination in all employment.

In passing we observe that eleven states in

addition to Washington have now enacted statutes to eliminate discrimination in employment by use of quasi-administrative agencies with power to investigate and remedy complaints by a cease and desist order enforceable in the courts. *Colorado Rev. Stat.*, Secs. 81-19-1 to 8; *Connecticut Gen. Stat.*, Secs. 7400 *et seq.*, 1955 Cum. Supp., ch. 371; *Massachusetts Laws Ann.*, Ch. 151 B, Secs. 1-10; *Michigan Public Acts*, 1955, No. 251; *Minnesota Sess. Laws*, 1955, Ch. 516; *New Jersey Stat. Ann.*, 1956 Cum. Supp., Secs. 18:25-1 to 28; *New Mexico Stat. Ann.*, Secs. 59-4-1 to 14; *New York, Exec. Laws*, S 296, *et seq.*; *Oregon Rev. Stat.*, Ch. 659; *Pennsylvania Stat. Ann.*, 1956, Cum. Supp., Title 43, Secs. 951-963; *Rhode Island Acts*, 1949, Ch. 2181; *Washington RCW* 49.60. Apparently, the decisions of these agencies have seldom reached the courts. In the cases reported the constitutionality seems to have been assumed. *Draper v. Clark Dairy*, 17 Conn. Supp. 93 (1950); *Tilley v. Local 35, International Brotherhood of Electrical Workers*, 18 Conn. Supp. 125 (1952); *Holland v. Edwards*, 307 N.Y. 38, 134 NYS2d 38, 119 N.E.2d 581 (1954).

Turning now to that portion of the statute dealing with discrimination in public accommodations, it should be observed that in the first year of statehood a Civil Rights Act was enacted to provide for full and equal enjoyment of public accommodations by all persons within this jurisdiction. *Laws*, 1889-90, chapter XXVI, p. 524, "Civil and Legal Rights." Similar legislation was again enacted in 1953, section 434, chapter 249, *Laws of 1909*; section 1, chapter 87, *Laws of 1953* (cf. *RCW* 9.91.010). While the constitutionality of the statute last referenced has not been challenged, it has been, apparently, assumed as it was the basis for actions in *Anderson v. Pantages Theatre Co.*, 114 Wash. 2d, 194 P. 813 (1921); *Goff v. Savage*, 122 Wash. 194, 210 P. 374 (1922); *Randall v. Cowlitz Amusements, Inc.*, 194 Wash. 82, 76 P.2d 1017 (1938); and *Browning v. Slenderella Systems of Seattle, Inc.*, Supreme Court Cause No. 34375, now filed but as yet unreported.

It should also be observed that twenty states, the District of Columbia and three territories have statutes prohibiting owners and operators of places of public accommodation from discriminating on racial or religious grounds in the admission of guests or prohibiting public advertisements designed to discourage the patronage of minority groups. *California Civil Code*, Sec.

51-65; *Colorado* Rev. Stat. (Secs. 25-1-1 to 25-2-5); *Connecticut* Gen. Stat., Sec. 691a, 692a, and Public Acts 1951, No. 21; *Illinois* Rev. Stat., Ch. 38, Secs. 125-128 (g), 129; *Indiana* Stat. Ann., Secs. 10-901, 10-902; *Iowa* Code, Sec. 735. 1-735.2; *Kansas* Gen. Stat. Ann., Sec. 21-2424; *Maine* Rev. Stat., Ch. 137, Sec. 50; *Massachusetts* Gen. Laws Ann., Ch. 272, Sec. 92A and 98, Ch. 151B, Sec. 5; *Michigan* Comp. Laws, Sec. 750.146-7; *Minnesota* Stat. Ann., Sec. 327.09; *Nebraska* Rev. Stat., Sec. 20-101-2; *New Hampshire* Rev. Laws, Ch. 354, Sec. 1; *New Jersey* Stat. Ann., Sec. 10:1-2 to 10:1-7 and 1956 Cum. Supp., Sec. 18:25-1 to 18:25-28; *New York* Civil Rights Law, Secs. 40-41, Exec. Law, Secs. 290-301; *Ohio* Code Ann., Secs. 12940-1; *Pennsylvania* Stat. Ann., Title 18k, Secs. 4653-4; *Rhode Island* Gen. Laws, Ch. 606, Secs. 28-29; *Washington* RCW 9.91.010; *Wisconsin* Stats., Sec. 942-04; *District of Columbia* Laws, 1871-1872, Part IV, pp. 65-66, Act of June 20, 1872; *Alaska* Civil Code, Secs. 20-1-3, 1-4; *Puerto Rico* Acts, 1943, #131; *Virgin Islands* Bill #1, 15th Leg. Assembly, 1950.

The constitutionality of thirteen of these statutes has been challenged *unsuccessfully*. *Rhone v. Loomis*, 74 Minn. 200 (1898); In re Opinion of the Justices, 247 Mass. 589 (1924); *Jones v. Kehrlein*, 49 Cal.App. 646, 194 P. 55 (1920); *Darius v. Apostolos*, 68 Colo. 323, 190 P. 510 (1919); *Baylies v. Curry*, 128 Ill. 287, 21 N.E. 595 (1889); *Pickett v. Kuchan*, 323 Ill. 138, 153 N.E. 667 (1926); *Fruchey v. Eagleson*, 15 Ind.App. 88, 43 N.E. 146 (1895); *Brown v. J. H. Bell Co.*, 146 Iowa 89, 123 N.W. 231, 124 N.W. 901 (1909); *Decuir v. Benson*, 27 La. Ann. 1 (1875), reversed on other grounds, 95 U.S. 485 (1878); *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890); *Nebraska Messenger v. State*, 25 Neb. 674, 41 N.W. 638 (1889); *People v. King*, 110 N.Y. 418 (1888); *Commonwealth v. George*, 61 Pa. Super. Ct. 412 (1915).

When the issue of the constitutionality of such legislation finally reached the United States Supreme Court in 1953, it was disposed of briefly and conclusively. The court affirmed the conviction of a restaurant proprietor for refusing to serve a Negro in violation of District of Columbia Civil Rights Ordinance. *District of Columbia v. Thompson Co.*, 346 U.S. 100, 97 L.Ed. 1480, 1489, 73 S.Ct. 1007 (1953). Therein the court said:

"... And certainly so far as the Federal Constitution is concerned *there is no doubt*

that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states. See *Railway Mail Asso. v. Coris*, 326 U.S. 88, 93, 94, 89 L.Ed. 2072, 2076, 2077, 65 S.Ct. 1483; *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 34, 92 L.Ed. 455, 462, 68 S.Ct. 358. . . ." (Emphasis supplied.)

In view of this legion of authority upholding the constitutionality of this type of legislation, further comment seems unnecessary.

Next, let us turn to subsection (3), "the right to secure publicly-assisted housing without discrimination" because of race, creed or color.

The sole basis for distinguishing the regulation of employment and public accommodations, which the courts have consistently upheld, from the regulation of housing is that such regulation is directed against rights in real property. However, it is conclusively settled that rights in real property are no more sacrosanct than other property rights, or liberty. In *Block v. Hirsh*, 256 U.S. 135, 65 L.Ed. 865, 870 (1920), the court said, in upholding emergency rent regulations:

"The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from 80 to 100 feet. Welch v. Swasey, 214 U.S. 91, 53 L.Ed. 923, 29 S.Ct. 567. Safe pillars may be required in coal mines. Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 58 L.Ed. 713, 34 S.Ct. 359. Billboards in cities may be registered. St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269, 63 L.Ed. 599, 39 S.Ct. 274. Watersheds in the country may be kept clear. Perley v. North Carolina, 249 U.S. 511, 63 L.Ed. 735, 39 S.Ct. 357. These cases are enough to establish that a public emergency will justify the legislature in restricting property rights in land to a certain

extent without compensation. But if, to answer one need, the legislature may limit height, to answer another it may limit rent. *We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature, but they certainly are not less pressing. . . .* (Emphasis supplied.)

And in *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 66 L.Ed. 595, 603 (1922), the court said:

"These authorities show that, from time to time, for a generation, as occasion arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property, as exempts it from the operation of the police power in appropriate cases, and in both the *Marcus Brown and Block Cases*, supra, it was held, in terms, that the existing circumstances clothed the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them to the extent provided for in the laws in those cases objected to." (Emphasis supplied.)

See also *Bowles v. Willingham*, 321 U.S. 503, 88 L.Ed. 892 (1944).

That real property is subject to reasonable regulations under the police power is also well illustrated by cases upholding the power of states and municipalities to prescribe the use to which real property may be put; *Lillions v. Gibbs*, 47 Wn. (2d) 629, 289 P.2d 203 (1955); *King County v. Lunn*, 32 Wn. (2d) 116, 200 P.2d 981 (1948); to fix the heights of buildings within reasonable limits, *Gorieb v. Fox*, 274 U.S. 603, 71 L.Ed. 1228 (1927); to exclude offensive trades, industries and structures likely to cause nuisances, *Reinman v. Little Rock*, 237 U.S. 171, 59 L.Ed. 900 (1915); *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L.Ed. 348 (1915); *Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 61 L.Ed. 472 (1917). See also *Hauser v. Arness*, 44 Wn. (2d) 358, 267 P.2d 691 (1954); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50, 86 A.L.R. 644, reversing 144 Wash. 74, 256 P. 781 (1927).

All of this is in accord with the pronouncement of the court in *State ex rel. Davis-Smith Co. v. Clausen*, supra, 65 Wash. 156, 117 p. 1101 (1911), set forth above, that the rights of proper-

ty and liberty are not absolute; that both are subject to reasonable regulations and prohibitions imposed in the interest of the public weal, pursuant to the police power.

C. The law is consistent with the requirements of equal protection.

The requirements of the special privileges and immunities provision of Art. I, Sec. 12, of the Washington Constitution and of the equal protection clause of the Federal Constitution were stated by Judge Steinert in terms succinct and clear in the case of *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936):

"To comply with these constitutional provisions, legislation involving classifications must meet and satisfy two requirements: (1) *The legislation must apply alike to all persons within the designated class; and* (2) *reasonable ground must exist for making a distinction between those who fall within the class and those who do not.*

"*Within the limits of these restrictive rules, the legislature has a wide measure of discretion, and its determination, when expressed in statutory enactment, cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, inequitable, and unjust.* *State v. McFarland*, 60 Wash. 98, 110 P. 792; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 P. 1101, 37 L.R.A. (N.S.) 466; *Litchman v. Shannon*, 90 Wash. 186, 155 P. 783; *State v. Cannon*, 125 Wash. 515, 217 P. 18; *Northern Cedar Co. v. French*, 131 Wash. 394, 230 P. 837; *Garretson Co. v. Robinson*, 178 Wash. 601, 35 P.2d 504." (Emphasis supplied.)

See also *State ex rel. Nor. P. R. Co. v. Henneford*, 3 Wn. (2d) 48, 99 P.2d 616 (1940); *Cotten v. Wilson*, supra, 27 Wn. (2d) 314, 178 P.2d 287 (1947); *Faxe v. Grandview*, 48 Wn. (2d) 342, 294 P.2d 402 (1956).

Now it is readily apparent that the law applies alike to all persons falling within the designated classes; but, what of the second requirement.

In regard to discrimination in employment, the law does not apply to employers who employ less than eight persons. In regard to public accommodations, the law does not apply to accommodations distinctly private nor to educational facilities operated or maintained by a bona fide religious or sectarian institution. In

regard to housing, the act applies to public-assisted housing, not all housing.

"In considering whether or not a legislative act is violative of the constitutional provisions invoked by the appellants, *it must be remembered that a lawful classification may rest on narrow distinctions.* Northern Cedar Co. v. French, 131 Wash. 394, 230 P. 837; Garretson Co. v. Robinson, 178 Wash. 601, 35 P.2d 504; German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A. 1915C, 1189." Pacific Coast Adjustment Co. v. Reese, 189 Wash. 347, 350, 65 P.2d 1057 (1937). (Emphasis supplied.)

That lawful classifications may rest on a narrow distinction is well illustrated by cases upholding regulations that included "commission merchants" but excepted non-profit cooperative marketing associations; that included "food stuffs" but did not include fish; Northern Cedar Co. v. French, 131 Wash. 394, 230 P. 837 (1924); and that included "farm products" but did not include grain. Garretson Co. v. Robinson, 178 Wash. 601, 35 P.2d 504 (1934).

Undoubtedly the best example of how narrow the distinction may be is Litchman v. Shannon, 90 Wash. 186, 155 P. 783 (1916). Therein the constitutionality of an act providing for entrance and tuition fees at the University of Washington was challenged. Appellants alleged discrimination because there were no such fees for students attending Washington State College. The court denied the discrimination, saying:

"Nor is there any merit in their contention of illegal discrimination. It was within the legislative discretion to determine whether there was necessity or justification for the charge of entrance and tuition fees to students desiring to attend the university while not requiring any such fees of students desiring to attend the State College of Washington at Pullman. *Those attending the state college are not attending the state university.* It is the universality of the operation of the law on all persons of the state similarly situated with reference to the subject-matter that determines its validity as a general and uniform law. Cawsey v. Brickey, 82 Wash. 653, 144 P. 938." (p. 192) (Emphasis supplied.)

There may be a need to expand the scope of the present act to include all employment and

all housing, but this is not a basis for rendering the act unconstitutional.

In Northern Cedar Co. v. French, supra, 131 Wash. 394, 406, 230 P. 837 (1924), the court said:

"In the first place, it may be that the legislature determined that the need for regulating the sale of food fish was not as great as that for the regulation of other food stuffs. We cannot say, as a matter of law, that the evils which the legislature found had grown up in connection with the marketing of various products covered by this statute prevail to the same extent in the sale of fish products. *But should it be conceded that there is as much reason to regulate the one as the other, still the act is not unconstitutional. It is not necessary that the legislature in one act cover all foods the sale of which needs regulation. It will not do to say that an act which justly regulates certain things is unlawful because it fails to regulate other things, even of a similar nature.*" (Emphasis supplied.)

The history of our laws against discrimination reveals that the legislature has sought to correct the evil on a step-by-step basis; it has been a gradual, an evolutionary reform. As noted above, the first public accommodations legislation was enacted in the first year of our statehood; subsequent legislation in this area was passed in 1909 and re-enacted in 1953; these were followed by the act now in question. The first law against discrimination in employment was chapter 83, Laws of 1949, which was followed by the present law. And, it was in the law now in question that the legislature took another step, making it an unfair practice to discriminate in respect to publicly-assisted housing.

It is settled that a step-by-step, gradual reform is proper:

"... We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. *The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power.* ... " National Labor R. Board v. Jones & L. Steel Corp., 301 U.S. 1, 81 L.Ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352, 1370 (1937) (Emphasis supplied.)

See also *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 81 L.Ed. 703 (1936), affirming 185 Wash. 581, 55 P.2d 1083; *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538, 93 L.Ed. 222, 69 S.Ct. 258, 6 A.L.R. 2d 481 (1948).

"... The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. Texas*, 310 U.S. 141, 84 L.Ed. 1124, 60 S.Ct. 879, 130 A.L.R. 1321. *Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.* *Semler v. Oregon State Dental Examiners*, 294 U.S. 608, 79 L.Ed. 1086, 55 S.Ct. 570. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A.F. of L. v. American Sash & Door Co.* 335 U.S. 538, 93 L.Ed. 222, 69 S.Ct. 258, 260, 6 A.L.R.2d 481. *The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.* . . . " *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 99 L.Ed. 563, 573, 75 S. Ct. 461 (1954). (Emphasis supplied.)

As previously noted, can it be said that the instant law is invidious, hateful and grudging because the legislature has chosen to preclude those who receive public assistance, who use public money from doing that which the government itself cannot do?

Indeed, how could the legislature, in the exercise of its wide discretion, in the exercise of its power to experiment with new techniques, in the exercise of its power to bring about reform on a step-by-step basis, have chosen a more reasonable beginning?

The classification considered reasonable in *New York State Commission v. Pelham Hall*

Apts., 170 N.Y.S.2d 750 (1958), was even more restrictive; therein the court upheld a similar statute that embraced only *multiple dwellings*, the financing of which is publicly assisted.

CONCLUSIONS

The case at bar is one of first impression in this state. We cannot rely on the doctrine of *stare decisis*, but we can rely under a doctrine even more ancient and fundamental. The rule of reason. Accordingly, we have quoted at length from the courts' decisions to illustrate the rationale for the rulings therein.

As a conclusion, the following pronouncement of our Supreme Court "commends itself to our approbation":

"The people of this area, for their mutual benefit and protection, established the state of Washington. They are the state. It acts are their acts. *The state, under its police power, has the right, and it is its duty, to protect its people in their health and general welfare. The very existence of government, as well as the security of the social order, depends upon this right.* This is especially true as to the health of the people, which affects every man, woman, and child within the state." *State v. Boren*, 36 Wn. (2d) 522, 525, 219 P.2d 566 (1950). (Emphasis supplied.)

Respectfully submitted,

JOHN J. O'CONNELL
Attorney General, State of
Washington

PHILIP R. MEADE
Assistant Attorney General

ELIHU HURWITZ
Assistant Attorney General

WING LUKE
Assistant Attorney General
Attorneys for Respondent.

Court's Memorandum Opinion

HODSON, J.

The petitioner John J. O'Meara is a Commander in the United States Coast Guard. He and his wife own a single-family residence at

3004 East 70th Street, Seattle, Washington. In the early spring of this year, Commander O'Meara received orders transferring him to Washington, D. C. He placed his Seattle home on the market by running an advertisement in

the Seattle Times and by posting "For Sale" signs on his front lawn and at other places in the neighborhood. He did not list it for sale with any real estate broker as he intended to deal directly with prospective purchasers.

The complainant, Robert L. Jones, is a Negro, employed by the United States Postal Service. On Sunday, April 19th, Mr. and Mrs. Jones and some friends visited and inspected the O'Meara home. On Tuesday, April 21st, complainant's attorney went to the O'Meara home and left with Mrs. O'Meara a signed earnest money receipt contemplating a sale for \$18,000, "all cash to seller on closing." The earnest money receipt was accompanied by a check for \$1,000 as a down payment. These documents were left with Mrs. O'Meara over her protest. On April 22, they were returned to complainant's attorney by Commander O'Meara.

[Lodges Complaint]

Mr. Jones lodged a complaint with the Washington State Board Against Discrimination, which followed the statutory administrative procedure by convening a hearing tribunal, which sat on Saturday, April 25th. The hearing consumed approximately eleven hours and the transcript of the testimony runs to 300 pages. Seven witnesses were heard. Thereafter, the hearing tribunal filed its opinion, findings of fact, and order. The hearing tribunal found, as a fact, that the O'Mearas had refused to sell their home to complainant because of his color, and that such refusal constituted an unfair practice as defined in RCW 49.60.217.

The home in question is approximately 24 years old. The O'Mearas bought it in 1955. It was financed through a private loan insured by the Federal Housing Administration, which hereafter in this opinion will be referred to as FHA. The law against discrimination under the authority of which the hearing tribunal sat, insofar as it applies to housing, was not enacted until 1957.

For the purposes of this opinion, it will be assumed that the hearing tribunal was correct in finding that the O'Mearas had refused to sell their home to complainant because of his color. The law with which we are here concerned, so far as applicable here, reads as follows:

"Be it enacted by the Legislature of the State of Washington:

"Section 1. Section 1, chapter 183, Laws

of 1949 and RCW 49.60.010 are each amended to read as follows:

"This chapter shall be known as the 'law against discrimination.' It is an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in places of public resort, accommodation or amusement, and in publicly-assisted housing because of race, creed, color, or national origin; and the board established hereunder is hereby given general jurisdiction and power for such purposes.

"Section 3. Section 2, chapter 183, Laws of 1949 and RCW 49.60.030 are each amended to read as follows:

"The right to be free from discrimination because of race, creed, color, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

"(3) The right to secure publicly-assisted housing without discrimination.

"'Publicly-assisted housing' includes any building, structure or portion thereof which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly-assisted only during

the life of such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof;

"Section 15. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to read as follows:

"It shall be an unfair practice:

"(1) For the owner of publicly-assisted housing to refuse to sell, rent, or lease to any person or persons such housing because of the race, creed, color, or national origin of such person or persons;"

This court is fully cognizant of the evils which flow from discrimination because of race, creed, or color in a free democratic society. The practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based and with the moral principles which we inherit from our Judeo-Christian tradition. Its effects, in terms of social, economic and psychological damage to the community, are well known. Segregated housing, in particular, is linked intimately with substandard, unhealthy, unsafe living conditions with resultant fire and health hazards. It undoubtedly contributes to instability in family life, moral laxity, and delinquency. It can and must be eliminated, not only in order that the members of our minority groups may reach their full potential but also in order that the majority may be brought to act in a manner consistent with the principles which they profess. It may be noted also that elimination of discrimination is necessary for the sake of America's relations with the rest of the world. Our standing with the so-called uncommitted peoples of the world suffers seriously because of the continued discrimination and segregation practiced in America.

[Material Used by Court]

In preparation for the hearing of this case, in addition to the legal authorities which have been cited by counsel and found by the court in in-

dependent research, the court has had the benefit of the following sociological material:

Report No. 37: Psychiatric Aspects of School Desegregation, Group for the Advancement of Psychiatry;

Where Shall We Live? Report of the Commission on Race and Housing, University of California Press;

American Jewish Congress: Committee on Law and Social Action
The Sharkey-Brown Isaacs Bill;

The Negro Potential, Ginsberg;

An American Dilemma, Gunnar Myrdal;

To Preserve These Rights
A Report of the President's Committee on Civil Rights;

The so-called Banner Report: A survey of community patterns conducted by the National Urban League for the Board of Directors of the Seattle Urban League;

The Testimony of James H. Scheuer from the Congressional Record of July 30, 1957;

Statements on the subject issued by various religious denominations as printed in Interracial News Service for January, February, March, and April, 1959;

A Statement of Principles and Objectives promulgated by the Administrative Board of the National Catholic Welfare Conference on November 14, 1958;

Prejudice and Your Child, Clark;

Racial and Cultural Minorities, Simpson-Yinger.

The court is in agreement not only with the testimony adduced in this case, but with most of the foregoing listed material. However, sociology is not law.

[Collision of Rights]

We are faced here with a head-on collision between two rights, both of which historically have been regarded as basic, natural, inherent, and inalienable. One is the right of every individual to be treated equally, regardless of such irrelevant factors as race, creed, and color. The other is the right of the owner of private

property to complete freedom of choice in selecting those with whom he will deal. This freedom of choice, as a legal conception, has been formalized as the principle of freedom of contract. It is a classic instance of the irresistible force meeting the immovable object. The danger is that, in our zeal to protect and enforce the right to equality, we may seriously invade and curtail the right to freedom of contract.

Only three similar or analogous cases have been found. Two terminated at the trial court level and one was decided last week by an intermediate appellate court. Research has revealed no case decided by the court of last resort of any state.

[Pelham Hall Case]

New York State Commission Against Discrimination vs. Pelham Hall Apartments, Inc., et al., is Index No. 8642/1957 in the Supreme Court of the State of New York for Westchester County. The Commission Against Discrimination had ordered the respondents not to discriminate in the leasing of apartments in alleged publicly-assisted housing. The respondents were the owners of a multiple-apartment dwelling. They refused to lease an apartment to one Shervington, a Negro. They admitted that their refusal was because of his race. The FHA commitment had been made on June 30, 1955, and the effective date of the New York statute was the following day, July 1st. It is to be noted that the New York statute is prospective only. It does not, as the Washington statute purports to do, apply to housing which was publicly assisted before its effective date. The bank advances which were made on account of the insured loan during construction of the project all came subsequent to the effective date of the act. It is to be noted also that the New York statute applies only to multiple dwellings or housing projects of ten or more contiguous houses. In the circumstances, the court had no difficulty in finding the respondents' property to be publicly assisted. On the constitutional question, the court recognized that the legislation could be justified only if it was determined that it was a valid exercise of the police power. It was held that the act was a valid exercise of the police power, and that its limitation to the specified classes of housing and to housing which became publicly assisted after July 1st, 1955, was a reasonable classification or at least was

not so arbitrary and unreasonable as to be in violation of the equal-protection clauses. Accordingly, the application of the Commission to enforce its order against the respondents was granted.

[Ming v. Horgan Considered]

Ming v. Horgan, et al., is No. 97130 in the Superior Court of the State of California for Sacramento County. That case was not brought under the provisions of a state antidiscrimination law to compel the sale of property. It was a civil suit by a Negro for damages for refusal to sell him property, to-wit: a "tract home" in one after another of FHA and GI-insured subdivisions in the Sacramento area. There were fourteen named defendants and ten Doe defendants. The defendants were real estate sales agents and builder-subdividers. The homes had been constructed after FHA and GI commitments had been obtained. Since nine other members of the plaintiff's race had had similar experiences, plaintiff's was not an isolated experience or the result of mistake or personal antipathy. There thus appeared a pattern of conduct on the part of the builder-subdividers and real estate agents which revealed a settled policy, at least tacitly understood, that sales in new housing developments or subdivisions would not be made to Negroes. Upon these facts, plaintiff relied on a conspiracy theory. The court noted that the subdividers and builders, as well as the real estate brokers and salesmen, were all required to have state licenses to engage in their respective activities. The court stated that there is no legal restriction whatever (absent a statute) against an individual discriminating on the basis of color, race, creed, or any other characteristic in exercise of his freedom to contract. Whatever legal restriction exists is a restriction on government. It recognized that the case involved no appropriation of money and no subsidy, and that the powers of government were exercised merely by way of mortgage insurance guaranty, inspection services, and other administrative accompaniments. The court concluded that no conspiracy had been established, and that the defendants had acted in the honest belief that to sell to a Negro would be the introduction into a white neighborhood of an inharmonious element not consistent with the obligation the defendants had to others to whom they had sold or hoped to sell and would be

detrimental to the property values in the subdivision. It was concluded that the plaintiff had established a violation of his rights and he was allowed nominal damages.

[*Leavitt Case*]

Leavitt & Sons, Inc., vs. Division Against Discrimination is No. A-334-58 in the Appellate Division of the Superior Court of New Jersey, decided July 22, 1959. In that case, the plaintiff appellant was the developer of approximately 16,000 one-family houses in a project known as Levittown. Its coplaintiff, Greenfield's Farm, Inc., was the developer of approximately 600 houses in Greenfield's Village. The FHA had committed itself to insure mortgages made by purchasers. It was necessary for FHA to approve the site and to lay down requirements concerning drainage, street layouts, parks, curbs, sidewalks, utilities, including water and sewage disposal, and such improvements as top soil, streets, trees, driveways, entrance walks, finish grade, etc. Individual applications were processed by the architectural valuation and mortgage credit sections in the Chief Underwriter's Office. During the course of the construction, FHA inspectors made periodic inspections. In fact, at Levittown a full-time FHA inspector was employed. The court concluded that the plaintiffs would not have undertaken the developments if they had not been assured of the availability of FHA financing and, accordingly, in view of the large scale and intimate connection of FHA with the developments, the court had no difficulty in concluding that they were "publicly assisted."

Prior to the Pelham case, *supra*, and prior to the effective date of the New York antidiscrimination law, the New York Court of Appeals decided the case of *Dorsey v. Stuyvesant Town Corporation*, (1949) 299 N.Y. 512, 87 N.E.2d 541. In that case, the respondent was a redevelopment company which had refused to lease an apartment to a Negro, who thereupon sought an injunction. The respondent had acquired its land and a tax subsidy through agencies of New York City, as well as the state, but the housing was erected with private funds. The court there held that the public assistance which the respondent had received was not sufficient to bring it within the constitutional inhibitions. The court, in effect, invited the legislature to fill the gap and the legislature subsequently did.

[*Role of 14th Amendment*]

The state here, in order to prevail, must demonstrate that the complainant Jones lies within the ambit of the equal-protection clause of the 14th Amendment to the United States Constitution, which is "an explicit safeguard of prohibited unfairness." *Bolling v. Sharpe*, 347 U.S. 497 (1954). However, the 14th Amendment proscribes only state action. Individual invasion of individual rights is not the subject matter of the 14th Amendment. *Civil Rights Cases*, 109 U.S. 3 (1883). However, in recent years the courts have greatly broadened the concept of state action, and have found a variety of activities to be such. In order to reach that conclusion, the courts have to find that the individuals concerned have conducted themselves by, for, or as the state. In order to be constitutional, the act in question must satisfy the notion of "state action". Insofar as the landowner is acting by, for, or as the state, the 14th Amendment is applicable, and insofar as he is acting in his private capacity, it does not apply.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the court held that restrictive covenants in deeds were not enforceable, that is, the aid of the state could not be invoked through the courts to enforce such covenants. However, the court recognized that voluntary enforcement or observance of such covenants did not violate a constitutional right. Here again the distinction between the state action and private action was recognized. The *Dorsey* case, *supra*, was decided one year later.

[*Presumed Constitutional*]

An act of the state legislature is entitled to a presumption of constitutionality. The burden is on the challenger to establish that the statute exceeds the power of the legislature and, unless there is a clear conflict with the constitution, the act must be upheld. *Gruen vs. State Tax Commission*, 35 Wn. (2d) 1, 211 P.2d 651 (1949); *Port of Tacoma v. Parosa*, 52 Wn. (2d) 181, 324 P.2d 438 (1958). The court cannot substitute its own judgment for that of the legislature as to the wisdom, expediency, or propriety of legislation. The legislative and judicial branches of the government are independent and coordinate. The court cannot set itself up as a super legislature. In the exercise of the police power, the legislature may enact any law to protect the health, safety, morals, and welfare of

the people. Necessarily, the police power is an elastic concept. Its reach must become longer as our society becomes more complicated. The only limitation is that the end which is sought to be attained shall be accomplished by methods consistent with due process. This simply means that the law must not be unreasonable, arbitrary, or capricious, and that the means selected to accomplish the desired result shall have a real and substantial relation to the object sought to be attained. *Nebbia vs. New York*, 291 U.S. 502 (1934); *United States vs. Carolene Products Co.*, 304 U.S. 144 (1938). Statutes are not to be declared unconstitutional merely because they may tend to cut down the property rights of certain private property owners and may result in some financial loss to them without provision for compensation therefor. *Block v. Hirsch*, 256 U.S. 135; 16 C.J.S. 1054-1058. However, it must not be forgotten that the right of private property is a fundamental, natural, and inalienable right guaranteed by the Federal and state constitutions. 16 C.J.S. 1048, et seq. One of the purposes for which our government was founded was to protect individuals in the enjoyment of private property, and one of the incidents of ownership has always been the right freely to choose those with whom the owner will deal.

[Cases Distinguished]

It may be that the *Pelham*, *Horgan*, and *Levitt* cases were correctly decided. A plausible argument can be made to the effect that one who obtains an FHA commitment prior to construction of a mass housing development and thereafter avails himself of all of the FHA's administrative machinery, including approval of the plans and inspection during construction, thereby becomes so intimately identified with government as to become affected with a public interest. It can be argued that such people become, to coin a phrase, persons of public accommodation. Land developers, builders of subdivisions, and real estate agents hold themselves out to the public as being prepared to provide wholesale housing for the masses, but the individual owner of a single private home presents an entirely different problem. Accordingly, the *New York*, *California*, and *New Jersey* cases are not here persuasive. Those cases all involve houses which had not become anyone's home at the time of FHA commitment. In fact, they had not even been constructed, and it can

well be argued that, as a matter of social policy, thoroughly integrated housing should first be brought about in such new developments because there it can be accomplished at the outset without disturbing established patterns.

In addition to the authorities cited elsewhere in this opinion, the court has read the following:

Pound, "Liberty of Contract," 18 *Yale Law Journal* 454;

Jacobson, "Federalism and Property Rights," 15 *New York University Law Quarterly* 319;

Witherwax, "Antidiscrimination Legislation As It Affects Real Property Rights," 23 *Albany Law Review* 75;

McNeill, "Is There a Civil Right to Housing Accommodations?" 33 *Notre Dame Lawyer* 463;

Fisher and Greenberg, "The New Jersey Housing Anti-Bias Law: Applicability to Non-State-Aided Developments," 12 *Rutgers Law Review* 557;

Walch, Note on Recent Legislation, 56 *Michigan Law Review* 1223;

P. G. A. and M. C. G., "Racial Discrimination in Housing," 107 *Pennsylvania Law Review* 515.

This court concludes that it is palpable sophistry to argue that Commander O'Meara, in endeavoring to sell his home, is acting by, for, or as the state. A private individual acting in his private capacity is perfectly free to discriminate as he pleases. The alchemy by which his conduct may be transmuted into state action is too subtle for this court to understand. The mere existence of an FHA insured mortgage on his house is far too tenuous a thread upon which to hang such a drastic invasion of his constitutional right to do as he pleases with his own property. The thumb of government rests too lightly upon the scales. It may very well be that, if the FHA itself had had a regulation, at the time he obtained his loan, declaring that those who took advantage of FHA benefits would thereby be prohibited from discriminating in the eventual sale of the property, such regulation would be valid and binding. He would then have had the choice of accepting FHA financing with such limitation, or obtaining private financing without FHA. In this case, the house was built long before there was any FHA, and Commander O'Meara obtained his loan two

years before the effective date of the antidiscrimination law. In the circumstances, it can hardly be argued that he voluntarily assumed any limitations at the time he obtained his loan. The court concludes, therefore, that, as applied to Commander O'Meara and others similarly situated, the act is unconstitutional and void as in violation of the 14th Amendment to the United States Constitution.

[Reasonableness of Classification]

One further question remains: Is the classification created by the act reasonable? It applies only to "publicly-assisted" property.

Mr. Justice Holmes, in *Patson v. Pennsylvania*, 232 U.S. 138 (1914), had the following to say on the subject:

"We start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. . . . It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. . . . The question therefore narrows itself to whether this court can say that the (legislature) was not warranted in assuming as its premise for the law that (the class which the

law singles out was) the peculiar source of the evil that it desired to prevent."

There is no reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages, or those who are purchasing upon contract. This act would prohibit Commander O'Meara from doing what his neighbors are at perfect liberty to do. It gives to those who have conventional mortgages, or no mortgages, and those who are buying upon contract, special privileges and immunities which are not accorded to him. The classification is arbitrary and capricious and bears no reasonable relation to the evil which is sought to be eliminated. It not only violates the equal-protection clause of the 14th Amendment to the United States Constitution, but violates the special privileges and immunities clause of Article I, Section 12, of the Washington State Constitution.

To uphold the act here in question by extending the state-action theory to the present set of facts would so seriously strain the already severely-tested concept of private property as to leave little of it standing. This court does not believe that we have yet reached that stage in our social evolution which would permit any such holding.

Accordingly, the order of the hearing tribunal of the State Board Against Discrimination is held to be null and void, and is hereby set aside. An appropriate order may be presented.

DATED at Seattle, this 31st day of July, 1959.

INDIANS

Criminal Law—Montana

UNITED STATES of America v. Gerald RED WOLF and Antoine P. Little Light.

United States District Court, District of Montana, Billings Division, March 30, 1959, 172 F.Supp. 168.

SUMMARY: Two young Indian men were charged in federal district court with the rape of an Indian girl under the age of eighteen within an Indian reservation in Montana. A motion was filed to quash the indictment on the ground that it failed to state an offense. The governing federal "Ten Major Crimes" statute provides in part that "any Indian who commits . . . rape . . . within Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States," and "the offense of rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offense of rape upon any female

Indian within the Indian country shall be imprisoned at the discretion of the court." The language of the Montana statute defining rape as "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under any of the following circumstances: (1) When the female is under the age of eighteen years . . .," was used in the indictment. However, in view of a long recognized distinction between rape and carnal knowledge in other federal criminal statutes, and legislative history indicating that carnal knowledge had been proposed but rejected by Congress as one of the "Major Crimes" over which, when committed in Indian country, federal courts were given jurisdiction, the court concluded that rape in the "Ten Major Crimes" statute does not include carnal knowledge, the latter offense being still within the exclusive jurisdiction of tribal courts when committed on a reservation by Indians against other Indians. The motion to dismiss the indictment was therefore granted.

JURISDICTION

Ecclesiastical Court—New York

BETH TOMCHE TORAH, etc., Landlord v. Mack HOWARD et al., Tenants.

Municipal Court of the City of New York, Borough of Manhattan, Second District, February 16, 1959, 185 N.Y.S.2d 511.

SUMMARY: In a summary proceeding in a New York City municipal court brought by a landlord to evict seven tenants from certain premises, the tenants argued, *inter alia*, that the issues should be determined by a rabbinical tribunal. The court, in issuing a final order for the landlord, stated that to permit a religious tribunal to decide a matter pending in the courts is inconsistent with fundamental judicial concepts of our government and in violation of the First Amendment prohibition against the establishment of religion. An excerpt from the opinion follows.

WAHL, Justice.

The third point is pointless. To permit a rabbinical tribunal or any other religious body to decide a matter pending in our courts is utterly inconsistent with our fundamental concept of our system of government. To recognize the existence of judicial autonomy by any racial, religious or ethnical group is abhorrent to our concept of juridical determination.

Any curiosity that this Court may have in any decree by a council of sages must be subordinated to the principle that it is impermissible to grant such request. We live in a democracy with a republican form of government. Under our system of government, there are three coordinated branches wherein, as every school boy

knows, the checks and balances are so arranged that one branch of government may not interfere with the other. To lend further emphasis, the first amendment of the Constitution of the United States forbids congress from enacting any law respecting the establishment of religion, and it has been declared that this amendment in reality provided for the separation of church and state. It is noteworthy that there has been a minimum of friction in this country between these entities because of the sedulous avoidance of any infringement of one upon the other. Therefore, to concede to any litigant the right to transfer his cause to a religious tribunal would be totally repugnant to our concept of democratic government.

There is, and there must be, only one judicial body in this State, and that is, our courts of law.

ORGANIZATIONS

Membership Corporations—New York

Application of ASSOCIATION FOR PRESERVATION OF FREEDOM OF CHOICE, Inc.

Supreme Court of New York, Special Term, Queens County, Part II, May 13, 1959, 187 N.Y.S.2d 706; July 9, 1959, 188 N.Y.S.2d 885.

SUMMARY: Pursuant to provisions of the New York Membership Corporation Law, certain individuals submitted to the New York Supreme Court for approval a certificate of incorporation as a membership corporation, the "Association for the Preservation of Freedom of Choice, Inc." The court preliminarily declared its duty to be "not merely to see to it that the requirements of the statute have been met, but also to judicially determine whether the objects and purposes of the proposed corporation are lawful, in accord with public policy and not injurious to the community." Finding that the organization's avowed purposes of promoting "individual freedom of choice and freedom of association" and of assisting "in the elimination of barriers to individual freedom of choice" negated the public policy of equality before the law as reflected in federal and state constitutional guarantees of equal protection and in state statutory prohibitions against racial discrimination, the court denied the application. A motion for rehearing was granted and upon rehearing the application was again denied, the court emphasizing that applicants were free to practice racial exclusiveness in individual associations and to speak out in favor of racial discrimination, but holding that they could not compel the state to grant them the privilege of incorporating for these purposes.

SHAPIRO, Justice.

William J. Neilan, Queens Village, for applicant.

[Original Hearing]

There has been submitted for approval, pursuant to section 10 of the Membership Corporations Law, a certificate of incorporation of "Association for the Preservation of Freedom of Choice, Inc." Among the purposes for which the sponsors desire to form this membership corporation are the following:

"(a) To promote the right to individual freedom of choice and freedom of association, constituting the right of the individual to associate with only those persons with whom he desires to associate;

"(c) To assist in the elimination of barriers to individual freedom of choice and its exercise in specific instances, as well as preventing and guarding against deprivation of this right at large;"

Coupled with these goals are the following additional purposes:

"(b) To conduct itself, and to encourage, promote, and aid in scientific research into problems engendered by a multi-cultural

society, into problems of intergroup relations, in areas of ethnic characteristics and patterns, and into the implications and effects of such problems on freedom of choice and association, and to publish and to encourage, promote, aid, and assist in publication of the results of such research in suitable scholarly periodicals and other publications;

• • • • •

"(d) To find and promote the means through freedom of choice and association by which the numerous groups in our multicultural society can find their fullest development."

[The Court's Duty]

In passing upon an application for the approval of a membership corporation, the duty of the court is not merely to see to it that the requirements of the statute have been met, but also to judicially determine whether the objects and purposes of the proposed corporation are lawful, in accord with public policy and not injurious to the community. Matter of General Von Steuben Bund, Inc., 159 Misc. 231, 287 N.Y.S. 527; Matter of Daughters of Israel Orphan Aid Soc., Inc., 125 Misc. 217, 210 N.Y.S. 541; Matter of Stillwell Political Club, Inc., Sup., 109 N.Y.S.2d 331; see also Matter of Deutsch-

Amerikanischer Volksfest-Verein, 200 Pa. 143, 49 A. 949, cited with approval in *Matter of Daughters of Israel Orphan Aid Soc., Inc.*, supra.

The certificate of the proposed membership corporation speaks in terms of "individual freedom of choice and freedom of association" and also of assisting "in the elimination of barriers to individual freedom of choice." Instinct in these avowed purposes, however, is the negation of a whole series of fundamental and basic rights which are the warp and woof of the way of life vouchsafed to *everyone* by the United States Constitution and that of the State of New York. While individuals, as such, where not otherwise inhibited by law, may freely indulge in their prejudices and bigotries—or as the proposed certificate of incorporation puts it—in their "individual freedom of choice and freedom of association," their purposes and intended practices should not be sanctioned by receiving the imprimatur of this court.

The national policy of equality before the law, as reflected in the Fifth and Fourteenth Amendments to the Federal Constitution, has been eloquently stated by the United States Supreme Court in *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774, when it said:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

The Constitution of the State of New York declares in Article I, section 11 thereof:

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

This declaration of policy has been reinforced by a whole series of state laws barring discrimination based on race or creed in places of public accommodation (Civil Rights Law, §§ 40, 41); in employment (State Law Against Discrimination, Executive Law, § 291), or in education (Education Law, § 313) and the various laws barring discrimination in public and publicly assisted housing.

In view of the public policy of our State against discrimination because of race or creed, it is not surprising that the courts have ruled that "Organizations for the purpose of perpetuating the division of our people into racial groups, . . . thus retarding homogeneity, should not be sanctioned." *Matter of Catalonian Nationalist Club*, 112 Misc. 207, 184 N.Y.S. 132, 133; *Matter of General Von Steuben Bund, Inc.*, 159 Misc. 231, 287 N.Y.S. 527, supra.

[Association's Real Purpose]

To this court it is clear that the use in the proposed charter of the Aesopian language: "To promote the right to individual freedom of choice and freedom of association" is but a cloak for the real purpose for which the corporation is sought to be organized, which is to say to certain segments of our population:

"You can't enter here.
You can't ride here.
You can't work here.
You can't play here.
You can't study here.
You can't eat here.
You can't drive here.
You can't walk here.
You can't worship here."

A corporation thus recognized would be able to engage in "indiscriminate impositions of inequalities," thereby frustrating the right to the "equal protection of the laws" to which even the lowliest inhabitant of our land is entitled. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 846, 92 L.Ed. 1161.

No matter how grandiose the language, when the malevolent purpose is apparent, the law should not permit itself to be used to further such ends. "Hatred is the vice of narrow souls; they feed it with all their littleness, and make it the pretext of base tryanny." (Balzac).

The application for approval of the proposed certificate of incorporation is denied.

[Rehearing]

SHAPIRO, J.

In 187 N.Y.S.2d 706 this court denied an application for a certificate of incorporation under § 10 of the Membership Corporations Law of a group calling itself the "Association for the Preservation of Freedom of Choice, Inc."

The court is now in receipt of a letter from Alfred Avins, Esq., enclosing a memorandum of law in which it is stated "The Association herewith requests reconsideration of the aforesaid opinion" and that "the certificate should be approved."

No notice of motion or supporting affidavit is submitted in connection with said application. The letter and memorandum will be considered a motion for reconsideration.

In essence the memorandum argues that the sponsors of the application are entitled to freedom of association, that the state public policy against discrimination based on race, creed or color in certain fields of activity is no bar to approval, and that what is called "freedom of choice" is a value in which reasonable people may believe.

In support of the argument that the sponsors are entitled to freedom of association, counsel for the applicants cite *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, one of the very cases cited by this court in its opinion denying approval of the proposed certificate of incorporation. In addition, the applicants rely upon the decisions of the U. S. Supreme Court in *N. A. A. C. P. v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, and in *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311, and an article by Jos. B. Robison dealing with freedom of association which appeared in the 58 *Columbia Law Review* 619.

[Free Association and Expression Not Denied]

The argument of the memorandum mistakes the issue. In no way was freedom of association or freedom of expression involved in the denial by this court of the application for approval of the certificate of incorporation. All that was denied to this group was the privilege of incorporation as a membership corporation. Certainly, the sponsors of the proposed membership corporation are completely free to associate for the purposes they spelled out in the proposed certificate. They are also free to speak out in support of racial and religious discrimination. But they may not compel the state to grant them, for these purposes, the benefits and privileges of incorporation as a membership corporation.

Mr. Justice Levy in *In re General Von Steuben Bund Inc.*, 159 Misc. 231, 287 N.Y.S. 527, 530,—a decision which counsel for the applicant acknowledges "is properly based"—stated that "where,

however, persons so banded together desire to secure the privilege of a corporation, another situation is presented". Mr. Justice Levy pointed out that in examining an application for incorporation as a membership corporation "It is the duty of the justice to act more than as a ministerial officer in meeting the requirements of the statute" and he emphasized that though incorporation under state law as a "privilege" be denied, such denial would in no way prevent a number of individuals from carrying out whatever lawful propaganda activities they may wish to engage in since no legal license is required for such a purpose.

[Incorporation is a Privilege]

This court has searched diligently and has found no precedent to support the implied claim of the applicants that the right to incorporate as a membership corporation is anything other than a privilege. The very framework of the Membership Corporations Law, which requires the approval of a Justice of the Supreme Court of the judicial district in which the office of the corporation is to be located, makes it clear that the Legislature intended to grant to the court discretion as to whether incorporation should be granted. As was pointed out by Mr. Justice Walsh in the *Application of Stillwell Political Club Inc.*, Sup., 109 N.Y.S.2d 331, at page 333, "Before approving a proposed membership corporation, it is the duty of the Court to be satisfied that the substance as well as the form does not violate the wholesome public policy and does not permit irresponsible or unequipped citizens to operate under a corporate charter which has been approved by the Court and will be accepted by the Secretary of State".

[Public Policy Against Discrimination]

There is a state public policy against discrimination. The memorandum of law submitted in support of the application acknowledges this fact. It fails, however, to deny or refute the conclusion of this Court, made in its prior ruling, that the purpose of the proposed corporation is to undermine the established legal guarantees of equal treatment, regardless of race or creed. On the contrary, counsel seek to justify their intent to support racial and religious discrimination with an irrelevant argument; they point out that the public policy of the State of New York does not seek to eliminate ethnic differences in our

population, that it actually promotes recognition of the contributions made to our country's welfare by various ethnic groups. The court considers this an irrelevant argument because it simply does not see any conflict in the two policies. The court believes it is fully possible to maintain equality of rights for all and, at the same time, cherish ethnic differences and contributions.

In seeking to undermine the authority of the *Matter of Catalanian Nationalist Club*, 112 Misc. 207, 184 N.Y.S. 132, counsel for the Association cite the cases of *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. But these cases dealt with an effort by the state to impose conformity in language and in religion on all of its citizens. That is hardly the issue raised by the application in this case.

In my opinion denying the application for incorporation, and after discussing the purposes for which I believed incorporation was really sought, I said [187 N.Y.S.2d 709]:

"No matter how grandiose the language, when the malevolent purpose is apparent, the law should not permit itself to be used to further such ends."

[*Incorporators' Malevolent Purpose*]

Even if it could be fairly contended that the proposed certificate of incorporation merely left to inference what this court called the "malevolent purpose" of the incorporators, the present memorandum of law clearly shows the face behind the mask and makes the conclusion heretofore drawn by the court inescapable.

In the memorandum we find the statement that "the Association intends to develop and present a point of view in the field of intergroup and race relations." What that point of view is, among other things, may be gleaned from their contention that there is nothing wrong in "merely declining to rent an apartment" to one by reason of his race, or his creed or his color.

In my opinion I stated that there is a "public policy of our State against discrimination because of race or creed." The memorandum of law submitted on behalf of the petitioners disagrees with that statement and contends "that not *all* discrimination based on race or creed is against public policy, but only such discrimination as the legislature finds to be *unreasonable*. And we sub-

mit that reasonable people may differ as to what constitutes 'reasonable' discrimination."

The memorandum then goes on to say that "While a majority of our citizens may consider anti-discrimination legislation to be wise today, at a future time this view may give way to other feelings." It then concludes that:

"* * * If the proposals of this association in the intergroup relations field have merit, they will be accepted in the market-place of ideas and bear fruit; otherwise, they will wither on the vine and die."

[*Free Speech Unimpaired*]

Their contention that their views "will wither on the vine and die" if they are not accepted in the market-place of public opinion is true. It is for that reason that this nation, as a leader among all others, has incorporated in its Constitution provisions guaranteeing the right of free speech, even if that speech be disagreeable to most of us.

We here cherish the immortal words of Voltaire, when he said:

"I disapprove of what you say, but I will defend to the death your right to say it."

So far as the proposed incorporators as individuals are concerned, they may, of course, "indulge in their prejudices and bigotries" but "their purposes and intended practices should not be sanctioned by receiving the imprimatur of this court." (See this court's original opinion.)

Our system of government can only be maintained by the free and untrammelled collision of ideas, but when those ideas run counter to the mores or policies of our laws, no group should be permitted to organize in *corporate form* with the sanction of the state to espouse such ideas. It could hardly be contended, for instance, that on the theory that otherwise they would be denied individual freedom of choice or freedom of expression, the incorporators here could compel the court to approve the organization of a corporation which sought as its purpose to propagandize for the repeal of the laws against bigamy. Yet, if the proponents' contention here is correct, that despite the public policy of our state and nation to the contrary of what they seek to espouse, this court has no choice and must grant them a charter, it would have no choice in the bigamy case either. Such proponents would have a perfect right as *individuals* to agitate for the abolition or repeal of the laws against

bigamy, but they could not *as a matter of right* demand incorporation for that purpose. The applicants here are in no better position.

In the year 1903 there was inscribed on a bronze tablet placed in the pedestal of the Statue of Liberty:

"Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me.
I lift my lamp beside the golden door."

No distinction is there made as to whether the poor and huddled masses, yearning for freedom, are white or black or yellow. All human souls are included.

In this year of 1959, with the sanction of a majority of our elected representatives, and with the approval of the President of the United States, we have seen admitted into our Union a state with an Oriental majority. Surely now is no time to disregard the plea engraved on the Liberty Bell:

"Proclaim liberty throughout the land unto *all* the inhabitants *thereof*."

All the inhabitants of our land are God's children, and *all* are entitled to equality of treatment, without discrimination, and this court does not conceive it to be his duty to certify and approve for incorporation an organization which by its every intendment negatives those basic principles of our land.

There is no constitutional or statutory requirement that a "hate group" be given a corporate charter.

[Approval of Certificate Denied]

The application for a rehearing is granted, and, upon such rehearing, the application for approval of the certificate of incorporation is denied on the merits and in the exercise of discretion.

If the proponents desire to appeal from this determination they may submit an order for entry thereon. Such order shall recite, as part of the papers considered by this court, the letter of counsel and the memorandum of law submitted in connection with the application for reconsideration.

ORGANIZATIONS NAACP—Arkansas

B. T. SHELTON et al. v. Ed I. McKINLEY, Jr., et al.

United States District Court, Eastern District, Arkansas, Western Division, June 8, 1959, Civil No. 3708.

SUMMARY: A Little Rock, Arkansas, Negro public school teacher and an association of Arkansas Negro teachers brought a class action in federal district court against Little Rock public school officials and others, seeking declaratory and injunctive relief against the enforcement of Act 10 of the 1958 Second Extraordinary Session of the Arkansas Legislature [3 Race Rel. L. Rep. 1049 (1958)] and of Act 115 of the 1959 regular session [4 Race Rel. L. Rep. 460 (1959)]. Act 10 generally prohibits the employment of a person as a public school teacher or administrator in the absence of an affidavit listing organizations to which he belongs, pays dues, or contributes (or has done so within the past five years), and voids contracts completed without such affidavit. Act 115 makes it unlawful for any member of the NAACP to be employed by the state or a subdivision thereof or a school district, authorizes employing agencies to require from employees affidavits respecting NAACP membership, and makes refusal to furnish the affidavit grounds for dismissal. A preamble to Act 115 states that the NAACP has created racial strife in Arkansas and that a committee of the Legislative

Council has found that the NAACP "is captive of the international communist conspiracy." Preliminarily, the three-judge district court held that: (1) plaintiff's situation as an NAACP member desiring a renewal of his contract for the 1959-60 school year presents a case or controversy between him and the Little Rock School District over which the court had jurisdiction; (2) while the suit was not a "true class action," under Federal Rule 23, it could be maintained for the benefit of plaintiffs and "others similarly situated"; and (3) in order to inform school people during the normal contracting period how these Acts affect them, and in order to avoid delay, confusion, and a multiplicity of state court suits, it was in the public interest for the court to determine the constitutional question presented instead of staying proceedings until state courts construed the Acts. The court then held Act 10 constitutional because it only requires employing authorities to ascertain the affiliations of their faculties, information the court deemed relevant to suitability for teacher employment, inasmuch as a board is entitled to consider a teacher applicant's "professional and political background and affiliations, to the end that it may select . . . those whose employment or retention in employment is to the best interest of all concerned." However, it was held that past failures of NAACP members to furnish an Act 10 affidavit while Act 115 was ostensibly in effect making such members ineligible for public employment, did not justify their discharges or render them ineligible for re-employment. Act 115 was declared unconstitutional under the Fourteenth Amendment since it makes mere membership in the NAACP a ground for dismissal or declaration of ineligibility for public employment, regardless of whether the person involved had knowledge of or sympathy with organizational ends as declared by the legislature or had participated in legislatively declared undesirable activities or had innocently joined the Association from sympathy with publicly announced and clearly lawful aims. However, injunctive relief was refused. Pointing out that Arkansas school teachers have no civil service or other vested rights in their jobs, the court invoked the principle that, in the absence of employee vested interest or of statute, an equity court will not interfere by injunction with the employer's power to determine whom he will employ or retain.

Before SANBORN, Circuit Judge, MILLER, District Judge, and HENLEY, District Judge.

PER CURIAM.

This is a class action in which the plaintiffs¹ seek declaratory and injunctive relief against the enforcement of Act 10 of the Second Extraordinary Session of the Arkansas Legislature, held in August, 1958, and of Act 115 of the regular 1959 session of that body. It is claimed that those statutes are violative of the First and Fourteenth Amendments to the Constitution of the United States. Upon the filing of the complaint, a statutory court of three judges was convened, and the case has been tried to that court.

Act 10 provides in substance that no person shall be employed or elected to employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor,

professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions. The Act further provides, among other things, that any contract entered into with any person who has not filed the prescribed affidavit shall be void; that no public moneys shall be paid to such person as compensation for his services; and that any such funds so paid may be recovered back either from the person receiving such funds or from the board of trustees or other governing body making the payment. The filing of a false affidavit is denounced as perjury, punishable by a fine of not less than five hundred nor more than one thousand dollars, and, in addition, the person filing the false affidavit is to lose his teaching license.

1. The plaintiffs are: B. T. Shelton, a Negro school teacher employed in the Little Rock public school system; the Arkansas Teachers Association (ATA), a professional organization, the membership of which consists of Negro school teachers and college professors in the State of Arkansas; and T. W. Cogg, the Executive Secretary of ATA. The plaintiff, Shelton, sues for himself and others similarly situated; and the ATA and Cogg are suing for the benefit of members of the Association.

[Prohibition on Membership]

Section 1 of Act 115 makes it unlawful for any member of the National Association for the Advancement of Colored People (hereinafter called NAACP) to be employed by the State of Arkansas or any of its subdivisions, or by any school district, and declares that the prohibition of such employment shall continue so long as membership in the NAACP exists. Section 2 authorizes employing agencies to require from any employee an affidavit as to whether he is a member of the NAACP and a refusal to furnish the affidavit is made a ground for dismissal from employment.

Section 3 of the Act provides in substance that any person discharged from or declared ineligible for public employment on account of NAACP membership may, within four months of such dismissal or declaration, petition the circuit court for an order to show cause why a hearing on the charges against him should not be had; that until the final judgment on such hearing the dismissal or declaration of ineligibility shall be stayed; that the hearing shall consist of the taking of evidence with the right of cross-examination, and that the burden of sustaining the validity of an order of dismissal or declaration of ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or declaration of ineligibility.

[Preamble Alleges Incitement]

The operative sections of this statute are preceded by a preamble, the gist of which is that the NAACP has been guilty of creating racial strife and turmoil in the State of Arkansas; that it has threatened progress in race relations in the State; that it has striven to stir up dissatisfaction and unrest among Negroes, and that because of its purposes and activities membership therein is incompatible with the "peace, tranquility and progress that all citizens have a right to enjoy." The preamble also contains a recitation that the Special Education Committee of the Arkansas Legislative Council² has found that the NAACP "is a captive of the international communist conspiracy."

When the suit was originally filed, B. T. Shel-

ton was the only named plaintiff, and the original defendants were the Little Rock, Arkansas Special School District, the members of the Board of Directors of that District, and the Superintendent of Schools. Subsequently, an amended complaint was filed adding ATA and its executive secretary as plaintiffs, and adding as defendants the Pine Bluff, Arkansas, Special School District, the members of the School Board of that District and the Superintendent of Schools, and the Board of Trustees and President of the Arkansas A.M.&N. College for Negroes.

[Other Defendants]

Also named as defendants were Bruce Bennett, Attorney General of the State of Arkansas, and Frank Holt, Prosecuting Attorney of the Sixth Judicial Circuit of Arkansas, which includes Little Rock. Both the attorney general and the prosecuting attorney filed motions to dismiss, and at the commencement of the trial it was agreed that the complaint might be dismissed as to them without prejudice. Also named as members of the Pine Bluff School Board were Ralph Mitchell, Jr., and J. C. Langley. It developed that one of these gentlemen had never been a member of the Board, and that the other had resigned prior to the filing of the suit, and it was agreed that the case might be dismissed as to them.

Reduced to essentials, the claim of the plaintiffs is that the two statutes in question deprive the plaintiff Shelton and others similarly situated, and the members of ATA of liberty and property without due process of law; that they deny them the equal protection of the law; that they infringe upon their rights of freedom of speech, freedom of the press, freedom of assembly and association and to petition for redress of grievances, and deny them privileges and immunities of citizens of the United States. It is further claimed that Shelton and the plaintiff class are threatened with irreparable injury and have no adequate remedy at law.

In their answers the defendants deny the claim of the plaintiffs that the statutes are unconstitutional; they further contend that this court is without jurisdiction, and that this is not a proper class action. In the alternative, they ask that proceedings herein be stayed until the two statutes can be construed by the Arkansas state courts.

2. The Arkansas Legislative Council is an agency of the Arkansas Legislature which functions during interims between sessions, makes studies of legislative problems, and reports thereon; to the Legislature.

[Declines To Submit Affidavit]

It appears that plaintiff Shelton has been employed as a teacher in the Little Rock Public School System for a number of years, and that he is a member of the NAACP; that on April 3 of the current year he and other teachers in the Little Rock system were called upon to submit the affidavits required by Act 10; that he declined to do so on the ground that the statute violated his constitutional rights; and that subsequently he received a letter signed by three members of the Little Rock School Board advising him that his contract had not been renewed for the 1959-60 school year and would not be renewed. By reason of a somewhat peculiar situation that existed with respect to the Little Rock School Board when the suit was filed and on the day of trial, which situation we find it unnecessary to detail, there is some uncertainty with respect to the exact status of Shelton's contract and those of certain other teachers who declined to submit the Act 10 affidavits. It has been stipulated, however, that the Little Rock School Board will act in conformity with ruling State statutes, and it is plain that if those statutes stand, Shelton will inevitably feel their impact if he has not already done so. Thus, we are satisfied that Shelton's situation presents a case or controversy between him and the Little Rock School District with respect to which this court has jurisdiction.

The claim that this is not a proper class action calls for no extended comment, since it is now well settled that a suit of this kind, while not a "true class action" can be maintained for the benefit of the named plaintiff and "others similarly situated" under the provisions of Rule 23, F.R.C.P., 28 USCA. (See the full discussion of such an action and of the effect of a judgment therein contained in 3 Moore's Federal Practice, 2d Ed. pp. 3442-3450, 3455-56, and 3465-68).

["Equitable Abstention" Discretionary]

With regard to the contention that this court should not proceed herein until the statutes have been construed by the State courts, we, of course, respect the doctrine of "equitable abstention", as it is sometimes called, and it has been applied in this district not infrequently. However, this doctrine is discretionary in its application, not jurisdictional. We see no problems of statutory construction in this case which

would move our discretion to stay proceedings as the defendants desire. Cf. NAACP v. Patty, DC, Va., 159 F.Supp. 503; see also dissenting opinion of Judge Parker in Bryan v. Austin, DC, S.C. 148 F.Supp. 563, 567. Moreover, this is contract time with the school districts in Arkansas. Both teachers and directors of those districts need to know where they stand with respect to both acts. Should proceedings herein be stayed, inevitably there would be undesirable delay and confusion likely to be accompanied by a multiplicity of suits in various sections of the State. Accordingly, we are of the view that the public interest calls for a determination of the Constitutional question presented by the record.

While there is certain language in the complaint that may indicate that the plaintiffs feel, at least to a certain extent, that the two statutes must be read together, we feel that they should be considered separately. Cf. *Garner v. Los Angeles Board of Public Works*, 341 U.S. 716, 720. And in view of certain decisions of the Supreme Court presently to be mentioned, we are satisfied that Act 10 is constitutional. On the other hand, it is clear that Act 115 is unconstitutional.

Act 10, unlike Act 115, does not make past or present membership in any organization a ground for discharge of or for refusal to employ a school teacher or college professor. It simply requires the local school boards and the governing bodies of institutions of higher learning to ascertain the affiliations of their respective faculties. Once that information has been furnished, so far as Act 10 is concerned, the local board or the governing body of a college is free to take any action it may choose with respect to the employment status of a given individual.

[Right To Know Organizations]

A public employer has a right to know the organizations to which its employees, including school teachers, belong or have belonged, or to which they are making or have made financial contributions. This right has been recognized in *Garner v. Board*, supra; *Adler v. Board of Education of the City of New York*, 342 U.S. 483; *Beilan v. Board of Education, School District of Philadelphia*, 357 U.S. 399; and *Lerner v. Casey*, 357 U.S. 468.

In the *Garner* case the Court, in upholding a requirement that public employees sign an affidavit revealing whether they had been mem-

bers of the Communist Party or of the Communist Political Action Association, and if so setting forth the dates and periods of membership, said:

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may well have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. . . ." (341 U.S. at 720).

In *Adler v. Board of Education of the City of New York*, *supra*, there was before the Court a challenge of the New York statutes designed to clear subversives from employment in the public school system. It was claimed that those statutes violated the freedom of speech and assembly of persons employed or seeking employment in the public schools. The Court said: "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn. v. Douds*, 339 U.S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers v. Mitchell*, 330 U.S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. . ." (342 U.S. at 492). A little further on in the opinion, the Court, after announcing that it was adhering to the *Garner* case, *supra*, went on to state:

" . . . A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be

considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." (342 U.S. at 493).

Garner and *Adler* were both adhered to less than a year ago in *Beilan v. Board of Education*, *supra*, wherein the court upheld the discharge of a school teacher on account of his refusal to answer questions put to him by his superintendent relative to his communist affiliations and activities. The Court said:

"By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher." (357 U.S. at 405).

Further on in the same opinion the Court said that there was no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness, and that such fitness "depends on a broad range of factors." (357 U.S. at 406). In discharging their annual tasks³ of selecting new teachers and determining which of the old ones should be retained in employment, Arkansas school boards and college trustees are not concerned alone with the professional training or instructional competency of their employees or applicants for employment, or even with their loyalty

3. In considering this case it is important to bear in mind that Arkansas, unlike certain other States, does not have any civil service system for its public school teachers. Those teachers usually are hired on a year-to-year basis, and while a wrongful discharge during a school year in breach of contract is actionable, the only specific job security that a teacher has beyond the end of a year is the statutory provision that if a teacher is not notified within 10 days after the end of a school year that his contract has not been renewed, it is automatically renewed for the following year. Ark. Stats. 1947, Section 80-1304(b); *Wabbaseka School District No. 7 v. Johnson*, 225 Ark. 982, 286 SW 2d 841.

to this country. While membership in a subversive organization, such as the Communist Party, is, of course, a relevant factor bearing upon a person's fitness for employment as a school teacher or college instructor, other factors are relevant as well. A school board in undertaking to select teachers is entitled to take into consideration not only an applicant's competency and loyalty, but also his or her personality, habits and manner of living, and social professional, and political background and affiliations, to the end that it may select not only competent teachers, but those whose employment or retention in employment is to the best interest of all concerned.

[Must Be Relevant]

This does not mean, of course, that the Legislature can require a local school district or institution of higher learning to make inquiries of its employees or applicants for employment that are wholly irrelevant to their suitability for employment. Thus, in *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449, cited by the plaintiffs, it was held that the Association could not be compelled by a State court to disclose its membership lists in connection with an action brought by the State on account of its alleged noncompliance with the Alabama statutes dealing with foreign corporations. The Court said: "... The issues in the litigation commenced by Alabama ... were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them." (357 U.S. at 464).

We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. Those are considerations of the legislative, not the judicial branch of the government. We hold, however, that the mere failure of a teacher who was a member of the National Association for the Advancement of Colored

People, to furnish the affidavit required by Act 10 while Act 115 was ostensibly in effect, thereby making himself ineligible for public employment by the terms of the latter Act, did not and does not compel or justify his discharge or render him ineligible for re-employment.

[Members Made Ineligible]

Taking up Act 115, there can be no question that the Act makes any member of the NAACP ineligible for public employment in the State of Arkansas. Section 3 of the Act, which gives to any person dismissed from or declared ineligible for employment under the provisions of the Act, a right to petition for an order to show cause why a hearing on such charges should not be had, does not change or modify the command of the Act. That section gives one who was dismissed or denied employment on the ground that he was a member of the NAACP, and who claims that he was not a member, an opportunity to obtain a hearing on that issue alone. Once membership is established, then discharge or a declaration of ineligibility automatically follows. Further, by the terms of the Act one who gives public employment to a member of the NAACP is subject to a fine of not more than \$100 for each such offense.

Under the Fourteenth Amendment to the Constitution of the United States, as construed in *Wieman v. Updegraff*, 344 U.S. 183, and *Slochower v. Board of Higher Education of the City of New York*, 350 U.S. 511, the statute is clearly unconstitutional since it makes mere membership in the NAACP a ground for dismissal from or a declaration of ineligibility for public employment, regardless of whether the employee or applicant involved had any knowledge of or sympathy with the aims and purposes of the organization, as declared by the Legislature, or had actively participated in the activities found by the Legislature to be anti-social and undesirable, or whether he was completely innocent of such knowledge, sympathy or participation and had joined and was desirous of maintaining his membership in the Association out of sympathy with its publicly announced objectives which are clearly lawful.

Even if the recitals of the preamble to the statute to the effect that the NAACP is devoted to the creation of racial unrest and turmoil are taken at face value, there is no declaration that the purposes and activities of the organi-

zation are designed to overthrow the government or that they are violative of any statute.⁴

[Arbitrary Standards Unlawful]

While public employing agencies have a wide if not unlimited discretion in selecting their employees, it does not follow that the Legislature can by statute require such agencies to apply a wholly arbitrary and discriminatory standard in hiring and firing. On the contrary, *Wieman v. Updegraff* and *Slochower v. Board*, both *supra*, establish that such cannot be done.

This Court, of course, cannot do otherwise than follow the decisions just mentioned. *Wieman v. Updegraff* involved the constitutionality of a statute of Oklahoma which required each state officer and employee, as a condition of his employment, to take an oath stating that he was not, and had not been for the preceding five years a member of any organization listed by the Attorney General of the United States as "communist front" or "subversive" and which statute, as construed by the State Supreme Court, barred persons from state employment solely on the basis of membership in such organization, regardless of their knowledge concerning the activities and purposes thereof. By an opinion in which all the Justices concurred, the Supreme Court held that the Act in suit, as thus construed, violated the Due Process Clause of the Fourteenth Amendment by making persons ineligible for public employment solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged. In so doing the Court distinguished its prior decisions involving state legislation aimed at safeguarding the public service from disloyalty, namely, *Garner v. Board of Public Works*, *supra*; *Adler v. Board of Education*, *supra*, and *Gerende v. Board of Supervisors*, 341 U.S. 56.

4. See Judge Parker's discussion of a similar preamble to the South Carolina statute involved in *Bryan v. Austin*, *supra*. With regard to the statement that the NAACP is a captive of the communist conspiracy, it is to be noted that the Legislature did not find that such was a fact, but simply stated that a committee of the Arkansas Legislative Council had so found; and while the Attorney General of Arkansas testified at the trial of this case that the findings of that committee were before the Legislature when it adopted Act 115, he did not testify that the Legislature itself had ever adopted those findings as its own. Thus, it is unnecessary for us to decide whether the Legislature had a right to make such a finding, or to determine what effect should be given to it had it in fact been made.

In the course of its opinion the Court said:

"There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy'. Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner*, *Adler* and *Gerende* is decisive. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." (344 U.S. at 190-191).

And in *Slochower v. Board of Education*, *supra*, it was said:

"... In *Wieman v. Updegraff*, 344 U.S. 183, we struck down a so-called 'loyalty oath' because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary. This case rests squarely on the proposition that 'constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory'. 344 U.S. at 192." (350 U.S. at 556)

See also *Sweazy v. New Hampshire*, 354 U.S. 234, 242, 251.

Since the fact of association alone cannot be used to determine disloyalty or disqualification, it is obvious that mere membership in the NAACP cannot be made a bar to public employment.

[Cannot Compel Hiring]

While the plaintiffs are entitled to a declaratory judgment to the effect that the State of Arkansas cannot constitutionally require that a person be discharged from public employment or be declared ineligible therefor merely because

he belongs to the NAACP, from which it necessarily follows that public hiring officials cannot be successfully prosecuted for declining to follow such a standard, it does not follow that this Court, as a court of equity, can compel any school board to hire a person as a teacher, or to retain him in its employment, or to forbid it to discharge him. This is true because of the well settled principle that an equity court, at least in the absence of a statute or of a situation where an employee has a vested right to or interest in his employment, will not interfere by injunction with the power of an employer to determine whom he will employ or retain in his employment. [As we have seen, school teachers in Arkansas have no vested rights in their jobs, and no right of re-instatement if wrongfully discharged. If a teacher is discharged in violation of his contract, his remedy is an action for damages. Such being the case, we do not believe that injunctive relief is appropriate here, nor, from a practical standpoint, do we think it necessary at this time.]

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED:

1. That without objection the motions to dismiss filed herein by Honorable Bruce Bennett, Attorney General of the State of Arkansas, and by Honorable Frank Holt, Prosecuting Attorney of the Sixth Judicial Circuit of the State of Arkansas, are granted without prejudice.

2. That without objection the motions to dismiss filed by the defendants Ralph Mitchell, Jr. and J. C. Langley are granted.

3. That to the extent that the plaintiffs seek declaratory and injunctive relief with respect to Act 10 of the Second Extraordinary Session of the 61st General Assembly of the State of Arkansas, the complaint and amended complaint are without merit and are dismissed with prejudice.

4. That the prayer of the plaintiffs for declaratory relief with respect to Act 115 of the regular session of the 62nd General Assembly of the State of Arkansas be, and the same hereby is granted, and that said statute be, and it hereby is, adjudged to be invalid and unenforceable as contravening the Fourteenth Amendment of the Constitution of the United States.

Dated this 8th day of June, 1959.

PUBLIC ACCOMMODATIONS Beauty Salons—Washington

Ola M. BROWNING and John P. Browning, her husband v. SLENDERELLA SYSTEMS OF SEATTLE, a corporation.

Supreme Court of Washington, En Banc, July 9, 1959, 341 P.2d 859.

SUMMARY: In a suit in a Washington state court brought under the state Public Accommodation Law [2 Race Rel. L. Rep. 461 (1957)], a Negro woman was awarded a \$750 judgment against a Seattle reducing salon for damages for the "embarrassment, humiliation, mental anguish and emotional shock" allegedly suffered by her when, after a two hour wait at the salon for a courtesy demonstration treatment, the manager, although not expressly stating that she would be refused service, told her privately that they had given her an appointment by telephone without knowing that she was colored and that "We have never served anybody but Caucasians and I just know you won't be happy here." 2 Race Rel. L. Rep. 618 (1957). On appeal, the Washington Supreme Court (6-3) held that the finding of discrimination below was supported by the evidence that such had occurred through "subtleties of conduct" just as surely as if there had been an openly expressed refusal to serve, and that a cause of action for damages could arise from a violation of the statute although it was criminal in form. However, it

was further held that although damages may be had for mental or emotional distress even in the absence of any physical injury when caused by a wrongful act intentionally done, such distress must be "severe"; and the facts indicated that the discrimination here, not involving public humiliation, had not caused plaintiff severe emotional distress but rather had created a desire for punitive action against defendant. The Supreme Court stated that the trial court, having failed to find that plaintiff had suffered mental or emotional distress, had apparently assumed that any discrimination calls for a judgment for substantial damages, and had put damages on a punitive rather than a compensatory basis, contrary to Washington common law. The Supreme Court remanded the case reduction of the damages to the "nominal sum" of \$100, with the parties to pay their respective appeal costs.

HILL, Judge.

This is a wrongful discrimination case.

Ola M. Browning, to whom we will refer throughout the opinion as though she were the only plaintiff, is colored and the wife of a dental surgeon in Seattle. On March 5, 1956, at about 10:25 a. m., she entered the Slenderella salon (operated by the defendant Slenderella Systems of Seattle), pursuant to an appointment made by telephone, for a courtesy demonstration of the Slenderella treatments. She gave her name at the reception desk, and was asked to be seated. She was not asked to sign the guest book, as others who came in were asked to do. She waited in the reception room until approximately 12:15 p. m., during which time she was assured on several occasions by the receptionist that she would be taken care of in a few minutes. In the meanwhile, however, the reception room would fill up with women and would empty again as they were served, and it became apparent to Mrs. Browning that everyone except herself was receiving service.

Near the end of that period, she had a conversation with the manager of the salon from whom she attempted to find out whether or not she could expect to be served. The answer was that "We have never served anybody but Caucasians and I just know you won't be happy here." When Mrs. Browning asked, "Why did you give me an appointment?" the manager answered, "Well, you know by phone we have no way of knowing you were colored." The manager was otherwise courteous. Mrs. Browning testified: "I asked her finally if she planned to serve me. She never said yes or no. She said she knew I wouldn't be happy there. Then I went home." The foregoing statement is based on the plaintiff's testimony, and takes no account of the evidence offered by the defendant, excusatory of the admitted failure to serve the plaintiff during the two hours she was in the salon.

[Action for Mental, Emotional Shock]

This action was brought by Mrs. Browning and her husband for damages for the "embarrassment, humiliation, mental anguish and emotional shock" allegedly suffered by Mrs. Browning in consequence of this act of discrimination against her. The trial court found:

"That on March 5, 1956, the plaintiff, Ola M. Browning was discriminated against on account of her race or color." (The defendant challenges this finding.)

"That the establishment known as the Slenderella System of Seattle, a corporation, and its business thereof, is within the meaning of the Public Accommodation Law, R.C.W. 9.91.010." (No exception is taken to this finding. It seems to us to be a conclusion of law, but it obviously is a determination that must be made before a cause of action can be established.)

From these findings the trial court drew the conclusion of law that the plaintiff was entitled to a judgment of \$750, together with costs. Judgment was entered for that amount, and the defendant appeals.

There are four issues in this case:

1. Was there discrimination against the plaintiff because of her race or color?
2. Was the discrimination within the purview of our public accommodation statute?
3. Is there a civil cause of action available to the person discriminated against in violation of that statute?
4. Do the findings of fact or the evidence support the judgment for damages in the sum of \$750?

All of these must be answered in the affirmative for the judgment to be sustained. The first three present little difficulty, and will be dis-

cussed with relative brevity; the fourth causes us considerable concern.

[Finding of Discrimination Upheld]

1. *Re: Discrimination.* The testimony of the plaintiff, as we have summarized it above, is sufficient to establish an act of discrimination by the defendant against the plaintiff on account of her race or color. The plaintiff was not told in so many words that she would not be served, or that she should leave; nor was any physical violence used or threatened. The defendant's employees were always courteous; however, one need not be obvious or forthright to effect a discrimination. As the New York court of appeals said in *Holland v. Edwards*, 1954, 307 N.Y. 38, 45, 119 N.E.2d 581, 584, 44 A.L.R.2d 1130:

"One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct . . . play no small part.' Cf. *National Labor Relations Bd. v. Express Pub. Co.*, 312 U.S. 426, 437, 61 S.Ct. 693, 700, 85 L.Ed. 930. . . ."

This case exemplifies the fact that discrimination may arise just as surely through "subtleties of conduct" as through an openly expressed refusal to serve. The trial court's finding on this issue is amply supported by the plaintiff's testimony.

[Place of Public Accommodation]

2. *Re: Status of Defendant's Establishment.* The pertinent part of the applicable statute is RCW 9.91.010(2), providing,

"Every person who denies to any other person because of race, creed, or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement, shall be guilty of a misdemeanor."

(While this type of statute is directed against discrimination because of race, creed, or color, it will be referred to as the public accommodation statute to distinguish it from RCW, chapter 49.60, which is denominated by the legislature as

the "Law Against Discrimination," and to which reference is hereafter made.)

It is conceded that the defendant's salon where the discrimination occurred is a "place of public resort, accommodation, assemblage, or amusement," within the purview of the quoted statute. The legislature, by chapter 87, Laws of 1953, re-enacted the 1909 public accommodation act, but added an additional subsection extending the meaning of various terms so as to remove the limitations which this court had placed on the act by its decision, in *Goff v. Savage*, 1922, 122 Wash. 194, 210 P. 374, holding that a soda fountain in a drug store was not a place of public accommodation; and its dictum in *Finnesey v. Seattle Baseball Club*, 1922, 122 Wash. 276, 210 P. 679, 30 A.L.R. 948, that a baseball park was not a place of public accommodation. Nor is any issue raised in this case with reference to the fact that the service sought by the plaintiff was a courtesy treatment, which was the distinction relied on by the Iowa supreme court in finding no actionable discrimination in *Brown v. J. H. Bell Co.*, 1910, 146 Iowa 89, 123 N.W. 231, 124 N.W. 901, 27 L.R.A. N.S., 407, Ann.Cas.1912B, 852, where the defendant was giving away samples of coffee at a food show and declined to serve the plaintiff.

[Civil Action Available]

3. *Re: Cause of Action.* A cause of action for damages can arise from a violation of our public accommodation act (RCW 9.91.010), notwithstanding the statute is criminal in form. *Powell v. Utz*, D.C. 1949, 87 F.Supp. 811; *Randall v. Cowlitz Amusements, Inc.*, 1938, 194 Wash. 82, 76 P.2d. 1017; *Anderson v. Pantages Theatre Co.*, 1921, 114 Wash. 24, 194 P. 813.

There is considerable variation in the provisions relating to damages in the public accommodation statutes of the various states (see note 1 in addendum).

This court—along with those of Iowa (*Hum-burd v. Crawford*, 1905, 128 Iowa 743, 105 N.W. 330; see *Amos v. Prom, Inc.*, D.C.1953, 115 F.Supp. 127, and D.C. 1954, 117 F.Supp. 615, for analysis of Iowa cases and law), Michigan (*Bolden v. Grand Rapids Operating Corp.*, 1927, 239 Mich. 318, 214 N.W. 241, 53 A.L.R. 183 [The Michigan statute has since been changed to specifically give the injured party a cause of action.]), New Jersey (*Raison v. Board of Education*, 1927, 103 N.J.L. 547, 137 A. 847), and

Pennsylvania (*Everett v. Harron*, 1955, 380 Pa. 123, 110 A.2d 383)—takes the position that the statute, while penal in form, is remedial in its nature and effect and gives to the person wrongfully discriminated against a civil remedy against the person guilty of wrongful discrimination. *Anderson v. Pantages Theatre Co.*, supra.

It is recognized that racial discrimination is a wrong that must be remedied. However, a civil action for damages for such discrimination is rarely resorted to in this state. This is probably due to the preference of those discriminated against to avail themselves of the administrative procedures (provided by RCW, chapter 49.60) through which the civil rights of minority groups can be secured through negotiation, conciliation, and persuasion, as well as through decrees based on adversary hearings before the board against discrimination. See note, 32 Wash.L.Rev. 185. These procedures are supplemented by making certain types of discrimination a misdemeanor. RCW 9.91.010.

Neither the administrative procedures, nor the penal provisions preclude the bringing of a civil action for damages, as is done here, for the violation of a right protected by the penal statute.

[Damages for Mental Distress]

4. *Re: Damages.* Damages may be had for mental or emotional distress, even in the absence of any physical injury, when caused by a wrongful act intentionally done. *United States v. Hambleton*, 9 Cir., 1950, 185 F.2d 564, 23 A.L.R.2d 568; *Gadbury v. Bleitz*, 1925, 133 Wash. 134, 233 P. 299, 44 A.L.R. 425; *Nordgren v. Lawrence*, 1913, 74 Wash. 305, 133 P. 436; *Davis v. Tacoma Ry. & Power Co.*, 1904, 35 Wash. 203, 77 P. 209, 66 L.R.A. 802. An act of discrimination in violation of a statute must be classed as a wrongful act intentionally done.

It is, however, not every emotional distress that warrants a judgment for substantial damages. The authorities are agreed that it must be a "severe emotional distress." Restatement, Torts (1948 Supp.), § 46.

William L. Prosser, dean of the university of California law school, gives an excellent and well documented statement concerning the development and present status of the law relative to mental and emotional disturbance, independent of any physical injury, in the law of torts in his recent (1955) *Handbook of the Law of Torts* (2nd. Ed.). See pages 38 through 46.

The changing concept of tort liability for emotional distress, unaccompanied by any physical injury, is well illustrated in the recent change from the statement in Restatement, Torts (1934), § 46, which read,

"Conduct Intended to Cause Emotional Distress Only. Except as stated in §§ 21 to 34 and § 48 [not here material], conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability

"(a) for emotional distress resulting therefrom, or

"(b) for bodily harm unexpectedly resulting from such disturbance."

to the following, which appears in the 1948 supplement to Restatement, Torts, § 46:

"Conduct Intended to Cause Emotional Distress Only. One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable

"(a) for such emotional distress, and

"(b) for bodily harm resulting from it."

['Severe' Is Key Word]

The key word is "severe." The American Law Institute makes the following statement as to the reason for the change:

"This is a part of the law of torts in which real developments have occurred in recent years and this development is continuing. The cases which have appeared since 1934 established that the interest in freedom from severe emotional distress is protected against intentional invasion [citing cases].

"The change in Section 46 is necessary in order to give an accurate Restatement of the present American law. There is a definite trend today in the United States to give an increasing amount of protection to the interest in freedom from emotional distress."

We quote also some of the comments under the new § 46:

"(g) In short, the rule stated in this section imposes liability for intentionally causing severe emotional distress in those situations in which the actor's conduct has gone beyond all reasonable bounds of decency. The prohibited conduct is conduct which

in the eyes of decent men and women in a civilized community is considered outrageous and intolerable. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'

"(h) The amount of damages to be awarded is a question for the trier of fact, subject to the power of the court to set aside a manifestly unreasonable award. Putting a valuation upon severe emotional distress where it is the only injury is no more difficult than evaluating it as an item of consequential damage, or than evaluating pain and suffering, or determining the amount to be awarded in a defamation case in which no special damages have been proved. * * *

"(i) The one who seeks damages must prove that he did suffer severe emotional distress. Although emotional distress is subjective there are many situations in which the genuineness of the claim that it was suffered is supported by the objective facts concerning the actor's conduct. The mere recitation of the conduct in Illustration 1 (As a practical joke, A falsely tells B that he has read in the paper that her son, C, who is a paratrooper in a division known to be then participating in an invasion of enemy territory in wartime, has been reported killed in action. B grieves over the supposed death of C. A is liable for the grief which he causes her.), * * * goes far to prove the truthfulness of the claim that the complainant did suffer intense grief. Knowledge of human nature tells one that intense grief is a normal emotional response to such a stimulus, and lack of such grief, an abnormal response. In such a case, the risk of the fabricated claim is slight and not sufficient to justify the denial of redress against the actor who intended to injure the other and succeeded."

["Severe" Emotional Distress Not Proved]

We have no difficulty in finding that the conduct of the defendant was "outrageous," but where is the proof of "severe emotional distress?"

The entire record upon the question of damages in this case is that the plaintiff was embarrassed by not being served in her turn and being conscious of the fact that it was because of her

color. In the plaintiff's words, it was "Just the total embarrassment of the whole situation." The defendant's receptionist, and the manager, were courteous to her at all times, although evasive as to when she could be served. There was no public humiliation; none of the other women in the reception room was aware that there was an act of discrimination. The plaintiff's conversation with the manager took place in the foyer between the reception room and the treatment rooms, where no one could overhear what was said.

We do not mean to imply that because no one but the plaintiff and the representatives of the defendant knew of the discrimination that the offense is to be minimized, but from the emphasis which the cases place upon the fact that the complained discrimination was, as in *Powell v. Utz*, supra [87 F.Supp. 812], "in the presence and hearing of others," one must conclude, as seems natural, that the publicity attached to the discrimination offers a greater stimulus to mental discomfort, embarrassment, or emotional distress.

The effect of the discrimination was, of course, purely subjective. When a representative of the defendant called the plaintiff the next day to apologize for what had happened, and to offer the plaintiff an appointment, the plaintiff thanked her for calling, but referred her to the plaintiff's attorney. This is more indicative of a desire for punitive action than of severe emotional distress. We can fully sympathize with the desire to punish the defendant for its discriminatory tactics, but punishment, under these circumstances, is the prerogative of the state. *Anderson v. Dalton*, 1952, 40 Wash.2d 894, 246 P.2d 853, 35 A.L.R.2d 302; *Spokane Truck & Dray Co. v. Hoefer*, 1891, 2 Wash. 45, 25 P. 1072, 11 L.R.A. 689.

[Trial Court's View]

Significantly, the trial court, in this case, did not concern itself with any question of emotional distress, severe or otherwise; there was no finding that the plaintiff suffered any embarrassment, humiliation, mental anguish, or emotional shock. The trial court was apparently of the view that if the plaintiff was discriminated against, a judgment for substantial damages followed. This puts damages on a punitive and not a compensatory basis, and is contrary to our long-established rule that in the absence of statutory authorization for a different measure of damages the damages recovered must be compensatory.

The findings in this case, being simply that the defendant operated a place of public accommodation within the purview of RCW 9.91.010 and that the plaintiff was discriminated against therein on account of her race or color, do not support the judgment for \$750. We have, as indicated, gone behind the findings to determine whether the evidence establishes "severe emotional distress," and conclude that it does not, unless it can be said that "severe emotional distress" can be presumed from any unlawful discrimination.

The character of the act, and its natural consequences, makes that an arguable presumption, but there is still no evidence that supports a substantial judgment for compensatory damages.

It may well be that the difficulties of proof of compensatory damages in such cases indicate that the states such as Iowa, which permit punitive or exemplary damages, have a more realistic approach to dealing with the problem of discrimination than we do.

These difficulties of proof may be the reason that some states provide that a person discriminated against may recover a penalty of a minimum amount and such other damages as may be established, and others establish the minimum and maximum amounts which can be recovered in a civil action. (See note 1 in addendum for states and recoveries granted or allowed.)

The supreme court of Illinois in commenting on the Illinois statute, which fixes a minimum recovery of \$25 and a maximum of \$500 to the person aggrieved by an act of discrimination, said that because damages could not be ascertained with any degree of certainty "The statute simply prescribes the minimum below which the caprice and the maximum beyond which the passion of a jury shall not fix damages." *Pickett v. Kuchan*, 1926, 323 Ill. 138, 141, 153 N.E. 667, 668, 49 A.L.R. 499.

[Damage Recovery Reduced]

Having neither exemplary damages, nor statutory floors and ceilings for recovery in discrimination cases, and no evidence in this case to sustain a substantial award for compensatory damages, we have no alternative but to hold that the plaintiff was proven no more than nominal damages. Four of the eight states which provide for a minimum recovery in a civil action fix it at \$100 (California, Massachusetts, New

Jersey, and New York; see addendum, note 1). This seems to us a proper amount to regard as nominal damages in such a case.

The judgment for the plaintiff is affirmed, and the cause is remanded to the trial court for the reduction of damages to the nominal sum of \$100.

The plaintiff-respondent has sustained her judgment, but the defendant-appellant has succeeded in reducing the damages from \$750 to a nominal amount. There being a modification of the judgment, both parties will pay their costs on this appeal.

DONWORTH, FINLEY, ROSELLINI, FOSTER and HUNTER, JJ., concur.

WEAVER, C. J., dissents.

Addendum

Note 1. Variations with reference to civil actions for damages for violations of public accommodation statutes.

Two states specifically give a cause of action to the person discriminated against, without setting either a minimum or maximum for the recovery: Kansas (Gen.Stat. of Kansas, § 21-2424); Michigan (Mich. Stat. Ann. § 28.344, Comp. Laws Supp. 1956, § 750.147). The Michigan statute provides for trebling the damages sustained.

Two states provide for a minimum recovery with no maximum: California, \$100 (Cal. Civil Code, §§ 52 and 54); Wisconsin, \$25 (Wis. Stat. Ann. § 942.04).

Three states provide for a maximum recovery with no minimum: Indiana, \$100 (Ind. Stat. Ann. § 10-902); Minnesota, \$500 (Minn. Stat. Ann. § 327.09); Oregon, \$500 (Ore. Rev. Stat. § 30.680).

Six states set both a minimum and a maximum recovery: Colorado, \$50 and \$500 (Colo. Rev. Stat. § 25-1-2); Illinois \$25 and \$500 (Ill. Stat. Ann., chapter 38, § 126); Massachusetts, \$100 and \$500 (Ann. Laws of Mass., chapter 272, § 98); New Jersey, \$100 and \$500 (N.J. Stat. Ann. § 10:1-6); New York, \$100 and \$500 (Book 8, McKinney's Consol. Laws of N. Y., Civil Rights Law, c. 6, § 41); Ohio, \$50 and \$500 (Ohio Rev. Code Ann. § 2901-35).

Six states, in addition to Washington, have statutes which are penal in nature, making no mention of any civil remedy: Alaska (Comp. Laws of Alaska, § 20-1-4); Connecticut (Gen. Stat. of Conn. § 53.35); Iowa (Iowa Code Ann.

§ 735.2); Nebraska (Rev.Stat. of Neb. § 20-102); New Hampshire (N.H.Rev.Stat.Ann. § 354.4); Pennsylvania (Purdon's Penn.Stat.Ann. 18, § 4654.

(No attempt has been made to determine how many of these states permit punitive or exemplary damages. It is clear that Iowa does. See *Amos v. Prom, Inc.*, D.C. 1954, 117 F.Supp. 615, for an extensive review of the Iowa cases.)

The statutes of all of the states above referred to, except California and Oregon, make a violation of the public accommodation statutes a criminal offense, generally a misdemeanor, carrying the penalty of a fine or imprisonment or both. Michigan adds a further possible penalty, the revocation of an offender's business license if one is held. In four states (Colorado, Indiana, Wisconsin, and Ohio) judgment in a civil action bars a criminal proceeding and vice versa.

Montana's statute goes no further than the statement of a public policy against discrimination on the basis of race, creed, or color (Rev. Codes of Mont. § 64-211).

Many of these states have created administrative agencies, like our own board against discrimination (RCW, chapter 4960) to work to eliminate conditions of discrimination. In Rhode Island, an appeal to such an administrative agency appears to be the only means of redressing and eliminating conditions of discrimination, except as to discrimination against those wearing the uniform of the United States, and, in such a case, \$100 plus the damages sustained may be recovered (General Laws of R.I., §§ 11-24-1 to 11-24-8).

Dissent

MALLERY, Judge (dissenting).

Because respondent is a Negress, the Slenderella Systems of Seattle, a private enterprise, courtously refused to give her a free reducing treatment, as advertised. She thereupon became abusive and brought this civil action for the injury to her feelings caused by the racial discrimination.

This is the first such action in this state. In allowing respondent to maintain her action, the majority opinion has stricken down the constitutional right of all *private* individuals of every race to choose with whom they will deal and associate in their *private* affairs.

No sanction for this result can be found in the recent segregation cases in the United States

supreme court involving Negro rights in *public* schools and *public* busses. These decisions were predicated upon section 1 of the fourteenth amendment to the United States constitution, which reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal* protection of the laws." (Italics mine.)

In the pre-Warren era, the courts had held that the privileges of Negroes under the fourteenth amendment, *supra*, were not *abridged* if they had available to them public services and facilities of *equal quality* to those enjoyed by white people. The Warren antisegregation rule abandoned that standard and substituted the unsegregated enjoyment of public services and facilities as the sole test of Negro equality before the law in such *public institutions*.

The *rights and privileges* of the fourteenth amendment, *supra*, as treated in the segregation decisions and as understood by everybody, related to *public institutions* and *public utilities* for the obvious reason that no person, whether white, black, red, or yellow, has any right whatever to compel another to do business with him in his *private* affairs.

[No Public Institution Involved]

No public institution or public utility is involved in the instant case. The Slenderella enterprise was not established by law to serve a public purpose. It is not a *public* utility with monopoly prerogatives granted to it by franchise in exchange for an unqualified obligation to serve everyone alike. Its employees are not public servants or officers. It deals in *private personal services*. Its business, like most service trades, is conducted pursuant to informal contracts. The fee is the consideration for the service. It is true the contracts are neither signed, sealed, nor reduced to writing. They are contracts, nevertheless, and, as such, must be voluntarily made and are then, and only then, mutually

enforceable. Since either party can refuse to contract, the respondent had no more right to compel service than Slenderella had to compel her to patronize its business.

There is a clear distinction between the non-discrimination enjoined upon a public employee in the discharge of his official duties, which are prescribed by laws applicable to all, and his unlimited freedom of action in his private affairs. There is no analogy between a public housing project operated in the government's proprietary capacity, wherein Negroes have equal rights, and a private home where there are no public rights whatever and into which even the King cannot enter.

[Private Business' Discrimination Legal]

No one is obliged to rent a room in one's home; but, if one chooses to operate a boarding house therein, it can be done with a clientele selected according to the taste or even the whim of the landlord. This right of discrimination in private businesses is a constitutional one.

The ninth amendment to the United States constitution specifically provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

All persons familiar with the rights of English speaking peoples know that their liberty inheres in the scope of the individual's right to make uncoerced choices as to what he will think and say; to what religion he will adhere; what occupation he will choose; where, when, how, and for whom he will work, and generally to be free to make his own decisions and choose his courses of action in his private civil affairs. These constitutional rights of lawabiding citizens are the very essence of American liberties. For instance, they far outweigh in importance the fifth amendment to the United States constitution which excuses criminals from giving evidence against themselves. It was, in fact, an afterthought. Our constitutional forefathers were chiefly concerned with the rights of honest men. They would have specified their rights with the same particularity that they did in regard to criminals if they had foreseen that courts would become unfamiliar with them.

In a Saturday Evening Post article of April 4, 1959, p. 32, entitled "When a Negro Moves Next Door," a Negro, who had bought a house in the

white district of Ashburton in Baltimore, told the assembled neighbors:

"If you want to protect your home and your way of life . . . continue living in your own home. . . ."

"Don't think you can escape the problem simply by putting your house up for sale and running away Even if you move far out in the suburbs There will be Negroes living near you.

"As a matter of fact, . . . if this area turns all Negro, I plan to move out to the suburbs with you." (Italics mine.)

If he does make such a move, he will be discriminating against Negroes. This he has a right to do for discrimination is but another word for free choice. Indeed, he would not be free himself if he had no right so to do. In dealings between men, both cannot be free unless each acts *voluntarily*, otherwise one is subjected to the other's will.

[Right To Exclusiveness Essential]

Cash registers ring for a Negro's as well as for a white man's money. Practically all American businesses, excepting a few having social overtones or involving personal services, actively seek Negro patronage for that reason. The few that do not serve Negroes adopt that policy either because their clientele insist upon exclusiveness, or because of the reluctance of employees to render intimate personal service to Negroes. Both the clientele and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom. No one is legally aggrieved by its exercise.

No sanction for destroying our most precious heritage can be found in the *criminal* statute cited by the majority opinion. It does not purport to create a civil cause of action. The statute refers to "place[s] of *public resort*." (Italics mine.) This phrase is without constitutional or legal significance. It has no magic to convert a *private* business into a governmental institution. If one man a week comes to a tailor shop, it is a place of *public resort*, but that does not make it a public utility or public institution, and the tailor still has the right to select his private clientele if he chooses to do so. As a matter of fact, the statute in question is not even valid as a

criminal statute. Obviously, this is not the occasion, however, to demonstrate its unconstitutionality.

The majority can find no sanction for violating the constitutional rights of the appellant by citing the conflicting decisions of foreign states for two conclusive reasons. (1) Only this court can declare the law or set a precedent in Washington. (2) Foreign courts are in substantial conflict on so many questions of law that they can neither be harmonized nor followed. Practical uniformity of laws has been attained between the states only by the uniform acts passed by the several legislatures.

[*Whites Subjected to Involuntary Servitude*]

The majority opinion violates the thirteenth amendment to the United States constitution. It provides, *inter alia*:

"Neither slavery nor involuntary servi-

*tude * * ** shall exist within the United States * * *"
(Italics mine.)

Negroes should be familiar with this amendment. Since its passage, they have not been compelled to serve any man against their will. When a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude. *Henderson v. Coleman*, 150 Fla. 185, 7 So.2d 177.

Through what an arc the pendulum of Negro rights has swung since the extreme position of the *Dred Scott* decision: Those rights reached dead center when the thirteenth amendment to the United States constitution abolished the ancient wrong of Negro slavery. This court has now swung to the opposite extreme in its opinion subjecting white people to "involuntary servitude" to Negroes.

I dissent.

OTT, J., concurs.

PUBLIC ACCOMMODATIONS Innkeepers—Utah

L. W. ARMWOOD and Mary K. Armwood v. William A. FRANCIS, d/b/a Uncle Bill's Dinner Bell Motel and Cafe.

Supreme Court of Utah, June 8, 1959, 340 P.2d 88.

SUMMARY: An action was brought in a Utah state district court by Negroes against a cafe and motel owner alleging a denial of meals at defendant's cafe in violation of a statute forbidding "innkeepers" to refuse without just cause, "to receive and entertain any guest." At the pre-trial, an order, conceded to be accurate, was entered stating that plaintiffs entered the cafe and served themselves to smorgasbord food items; that, after the arrival of police, defendant offered, at his own expense, to serve plaintiffs; and that plaintiffs made no request for lodging. Plaintiffs failed to answer interrogatories as to what was said, whether anyone prevented them from obtaining food, and who the person was whom they alleged denied them service. Plaintiffs moved for summary judgment, but defendant's motion to dismiss was granted. On appeal, the Utah Supreme Court affirmed, holding that as a matter of law defendant did not violate the statute because there was no evidence that plaintiffs were refused service. "We have held that a restaurant in and of itself is not an inn," stated the court, adding that the trial court might well also have concluded as a matter of law that there was no evidence to establish that an innkeeper-guest relationship existed.

HENRIOD, Justice.

Appeal from a judgment dismissing plaintiffs' complaint. Affirmed, with costs to respondent.

This case was decided upon the pleadings and upon answers to interrogatories under the rules relating to discovery,¹ when a motion to

1. Rule 33, Utah Rules of Civil Procedure.

dismiss was granted after a pre-trial hearing. At the pre-trial, an order was entered, conceded to be accurate by counsel for both sides, as to the admitted facts stated therein and as to the respective contentions of the litigants. The order set out generally the contentions of the parties, plaintiffs' being that a meal was sought at defendant's cafe, where plaintiffs were denied service in violation of Title 76-31-2, Utah Code Annotated 1953,² and defendant's being that plaintiffs came to the cafe, but not to his motel or any other part of his property that could be classified as an inn under the statute, defendant denying that he refused the service mentioned or that he requested them to leave, countering that he invited them to stay and eat gratis.

The remaining portion of the pre-trial order set out what the parties conceded were undenied evidence, which stated:

"The uncontroverted facts in the case are: that the plaintiffs, on the 1st day of September, 1957, went to defendant's place of business at about 861 No. Second West, and served themselves to certain food items at which is called the Smorgasbord, and then seated themselves at a table; the plaintiffs were colored people; later the police arrived, and after the police arrived, the defendant offered to serve the plaintiffs a meal at the defendant's expense. The plaintiffs did not make any request for lodging."

Plaintiffs urge three points on appeal: 1) that an inn is a place where travelers or sojourners are provided with the accommodation of lodging, food and drink, 2) that plaintiffs became defendant's guests, and 3) that whether or not defendant's cafe was a part of his motel business was a question of fact for the jury.

We do not disagree with point 1) since it is but a definition of the word "inn." As to point 2), it appears obvious that the word "guest" is used as it might relate to innkeepers, which we will discuss later. As to point 3), that whether the cafe was a part of the motel was a question of fact for the jury, apparently the matter was left to the trial court, on defendant's motion to dismiss, the plaintiffs having invited the trial court to determine the matter by motion for summary judgment³ "determining liability of the

defendant" and the defendant likewise having made such an invitation by motion to dismiss "because the complaint and pleadings and pre-trial order fail to state a claim," there being no other request or demand for further proceedings shown in the record, plaintiffs merely appealing from the judgment dismissing the complaint.

[Result of Interrogatories]

Up to the time these motions were interposed, both parties had employed the discovery procedure and the motions were based on the pleadings and the facts adduced by such discovery procedure. Defendants asked 21 questions of plaintiffs, and they asked 4 of him, with the following results:

Of the 21 interrogatories put to plaintiffs, 7 were answered, which pointed up the facts that they had gone to the cafe, entered what they described as "main entrance of office and cafe," spoke to defendant's employees when they were at the smorgasbord table to make a selection of salad and meat; that they selected the salad, and ate the food but "did not complete the salad"; that they did not return to the cafe, but waited in their car "until the police officer arrived."

Plaintiffs wholly failed to answer interrogatories put to them calling for information as to who was present and what was said; whether anyone prevented them from obtaining food; where they went and what they did after obtaining food; whether they ate the food; who the person was whom they alleged denied them service; such person's description with respect to sex, age, physical characteristics and dress; where any conversation took place; what the employees were doing; what was actually said; what they did after the alleged conversation; where they went thereafter; and as to whether or not they had been offered a meal by defendant gratis.

[Motel Separate]

On the other hand, defendant answered all of plaintiffs' interrogatories, which answers evidenced the facts that "a license was issued" by the city "for 861 No. 2nd West," and one for the motel; however, that the motel units were separate and apart from 861 No. 2nd West and "had no physical connection therewith" and that "reservations for the motel could be obtained from the cashier at 861 No. 2nd West," which was a restaurant; and that actually no office was maintained there for the motel.

2. "Every person and every agent or officer of any corporation carrying on business as an innkeeper who refuses, without just cause or excuse, to receive and entertain any guest is guilty of a misdemeanor." 3. Under Rule 56.

Counsel for plaintiffs, in moving for summary judgment, stated in a supporting affidavit that he had seen a sign at the motel reading "Motel Office in Cafe, 861 North Second West."

The motion to dismiss that was granted, was based "on the complaint, pleadings and pre-trial order," but the dismissal did not specify whether it was made because 1) there was no innkeeper-guest relationship as contemplated under the statute, or 2) whether there simply was no refusal to serve and therefore no violation of the statute, irrespective of any innkeeper-guest relationship.

From an examination of the pre-trial order and the answers to the interrogatories it appears that as a matter of law the defendant did not violate the statute since there appears to be no evidence to the effect that the plaintiffs were refused service. This, although the plaintiffs had ample opportunity to answer pertinent interrogatories calling for the facts with respect to any such refusal. The trial court, therefore, was not in error in granting the motion to dismiss.

As to the innkeeper-guest relationship aspect of this case, which we really need not decide, it would appear that about the only evidence pointing at all to any such relationship was the affidavit of counsel with respect to the sign reading "Motel Office in Cafe," which falls far short of establishing any such relationship. Absent any further evidence, the trial court well might have concluded specifically that as a matter of law also, there was no such relationship in this case.

[Each Case Different]

Each case involving the existence or non-existence of this relationship must be determined on its own particular facts. Parenthetically, however, we might suggest that the world has come a long way since necessity created the innkeeper-guest relation as known at common law, with its own distinct liability. We think courts may be prone to take a second look at that relationship before applying it to the hostleries of the space age in a case where, for example, a traveler aboard a covered wagon might arrive at a skyscraper hotel, demanding not only food and refreshment, but an attendant to tether, groom and hay his horses, and barn his wagon.

We have held that a restaurant in and of itself is not an inn either in the common law or

modern sense.⁴ Plaintiffs' authorities generally have to do with controversies involving those who have sought, claimed and/or obtained lodging, as was not the case here, and which otherwise are factually different than the instant case. As to the whole relationship, in its modern aspect, we are somewhat impressed by the logic and reasoning of much of the language in *Alpaugh v. Wolverton*, 1946, 184 Va. 943, 36 S.E.2d 906, cited by defendant, which more nearly approaches the situation we have, and to which language, without repetition here, reference is made for the interested reader.

WADE and McDONOUGH, JJ., and TUCKETT, District Judge, concur.

CROCKETT, C. J., will file concurring opinion later.

[Concurring Opinion]

CROCKETT, Chief Justice (concurring).

I concur in affirming the judgment but am impelled to express my regret that such is the state of our law. The statute relied upon by the plaintiffs proscribing refusal of service applies to an "innkeeper." As indicated in the main opinion, this court held in the *Nance v. Mayflower Tavern* case that a cafe as such does not fall within the meaning of that statute. The plaintiffs were seeking to patronize the cafe and not the lodging provided by the motel maintained by the defendant. Thus, under our law as it stands, I think the determination is correct.

Proposed "civil rights" bills prohibiting discrimination in public places on the basis of race or color have been introduced in practically every session of our legislature for at least the last 25 years. It is unfortunate from the writer's point of view that no such law has yet been enacted. However, it is reassuring to note that such bills seem to have made substantial progress in gaining support over the years. In the 1959 session just concluded, a moderate bill, carrying only a penalty of actual damages for any aggrieved person, was introduced and passed in the House. A public hearing was held, at which considerable support was voiced, and no one spoke against it. The vote was 51 for, 11 against, 1 absent. But in the Senate it met opposition and was left to die in Sifting Committee without being brought to a vote.

4. *Nance v. Mayflower Tavern*, 1944, 106 Utah 517, 150 P.2d 773.

[Fate of Legislation]

It is unfortunate that such has to be the fate of legislation which only seeks to afford all citizens the ordinary decency of being accepted on a standard of equality in places serving the general public. This appears to be plainly envisioned by the idealistic declarations in the documents upon which the foundations of our government rest, but which realistically it must be admitted are not given full and literal effect in practice. It is reassuring that there are signs of encouragement in recent years. There seems to have been a reawakening and a resurgence of the spirit of liberty in our land manifest in a movement toward a fuller and more practical recognition of the basic natural rights inherent in the often proclaimed ideal that "all men are created equal." This question cannot be escaped: if we continue to prate of this ideal, why don't we move toward its practice in reality and the elimination of second-class citizenship.

The origin and history of our state suggest that here of all places one could expect the rights of minorities to be safeguarded. We have ventured some pride in believing that in most areas of our social relationships we manifest a tolerant and humanitarian attitude toward all

men. It seems anomalous that we should be among the backward states of the union in adopting civil rights legislation. The couplet of Alexander Pope is appropriate:

"Be not the first by whom the new is
tried
"Nor yet the last to cast the old
aside."

[Law-Making Power]

Notwithstanding the merits of plaintiffs' contention under the general ideals of our system of law and democracy, and the desirability of having their rights and all similarly situated protected, it must be appreciated that the law-making power is in the legislature as the representatives of the people. It has spoken on the subject, selecting "innkeepers" as the only class of business in which discrimination is expressly prohibited. Howsoever desirable any objective may be, I agree that interpretation and application of the law is the extent of the judicial prerogative and that it does not extend to legislation. Under the state of our statute and decisional law, I see no other course than to concur in affirming the judgment.

PUBLIC ACCOMMODATIONS

Private Clubs—New York

Application of LAKE PLACID CLUB, Inc., v. Charles ABRAMS, Individually and as Chairman of the New York State Commission Against Discrimination and Blanche I. Lubow.

Court of Appeals of New York, May 29, 1959, 188 N.Y.S.2d 561.

SUMMARY: On application by a private club, the Supreme Court of New York, Albany County, granted a prohibition against the chairman of the New York State Commission Against Discrimination (SCAD) and a Jewish woman who had filed a complaint with SCAD against the club charging it with discrimination because of creed contrary to state statutes. Subsequently, the Appellate Division reversed the prohibition order and dismissed the club's proceeding. 6 A.D.2d 469, 179 N.Y.S.2d 487, 3 Race Rel. L. Rep. 1224 (1958). The club's application for a stay pending appeal to the Court of Appeals was granted. 180 N.Y.S.2d 254, 4 Race Rel. L. Rep. 159 (1958). On appeal, the Court of Appeals affirmed by a memorandum decision.

Appeal from Supreme Court, Appellate Division, Third Department, 6 A.D.2d 469, 179 N.Y.S.2d 487.

Petitioner brought a proceeding in the nature of prohibition under the Civil Practice Act, § 1283 et seq. against the chairman of the New

York State Commission Against Discrimination, individually and as chairman, and complainant, who had filed a complaint against the petitioner and travel agency, on ground that they had discriminated against her with respect to facilities of petitioner, which allegedly maintained a place of public accommodation, because complainant was of the Jewish faith.

The Supreme Court, Special Term, Albany County, Kenneth S. MacAffer, J., entered an order in favor of the petitioner, and the commissioner and the complainant appealed.

The Appellate Division, Foster, P. J., 6 A.D.2d 469, 179 N.Y.S.2d 487 reversed the order, dismissed the proceeding, and held that where chairman was abroad and had not delegated his duties to another commissioner at time organization wrote to chairman complaining of its failure to get a copy of decision that petitioner's

club was not a place of public resort within meaning of statute prohibiting discrimination based on creed in places of public resort, and, had chairman been home, letter would have been answered promptly and there would have been time for organization to apply for reconsideration before expiration of period within which reconsideration might be applied for, chairman had power to waive strict compliance with rule with respect to application for reconsideration and to entertain application for reconsideration after expiration of period.

The petitioner appealed to the Court of Appeals.

Sol Rabkin and Paul Hartman, New York City, (Arnold Forster, New York City, of counsel), for respondent.

Order affirmed, without costs.

All concur except BURKE, J., taking no part.

PUBLIC ACCOMMODATIONS

Restaurants—Virginia

Charles E. WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, Russell V. Keys and Mary Barnes.

United States District Court, Eastern District, Virginia, January 7, 1959, Civil 1691; United States Court of Appeals, Fourth Circuit, July 16, 1959, No. 7867.

SUMMARY: A Negro attorney brought a class action in federal court against a restaurant located in Alexandria, Virginia, seeking a declaratory judgment that a refusal to serve him because of race violated the Interstate Commerce Clause of the Federal Constitution and the Civil Rights Act of 1875; an injunction against further such exclusions; and a money penalty for the alleged statutory violation. Defendant's motion to dismiss the complaint for want of jurisdiction and failure to state a cause of action was granted, and plaintiff's motion for summary judgment was denied by the district court on the grounds that defendant's restaurant, not being a facility of interstate commerce, could refuse service to anyone and that the Act of 1875 does not embrace actions of individuals. On appeal, the Court of Appeals for the Fourth Circuit affirmed. It was held that the suit could not be sustained under the provisions of the Civil Rights Act of 1875, which had been declared unconstitutional in the *Civil Rights Cases* [109 U.S. 3 (1883)]. The Virginia license laws making it unlawful to operate a restaurant without a permit from the State Board of Health Commissioner, being designed only to protect community health, were held not to impose a positive duty upon the state to prohibit discrimination regarding the persons served by a licensed restaurant. And the fact that a restaurant serves some persons traveling from state to state was held not to result in its being

engaged in interstate commerce; rather, as "an instrument of local commerce" it is "at liberty to deal with such persons as it may select." The district court order of dismissal and the Court of Appeals decision affirming the judgment appear below.

ORDER OF DISMISSAL

Upon consideration of the motion of the defendants to dismiss this action for want of jurisdiction and the failure of the complaint to state a claim upon which relief can be granted, as well as the motion of the plaintiff for summary judgment, and the arguments of the plaintiff pro se and defendants' counsel and supporting memoranda of authorities, the court being advised by the plaintiff in argument that jurisdiction is not asserted upon the ground of diversity of citizenship and that he does not rely upon any statute of the State of Virginia in regard to the segregation of races, but that the plaintiff bases his case solely upon the provisions of the Federal Constitution and the Acts of Congress relating to interstate commerce and upon the Civil Rights Act of 1875, the court is of the opinion that the motion of the defendants should be sustained and the motion of the plaintiff overruled, for the reasons that the defendants had the right to refuse service to any one at any time, that the defendants' restaurant was not a facility of interstate commerce, and the Act of 1875 does not embrace individuals' actions, and, therefore, it is

ORDERED that the motion of the plaintiff for summary judgment be, and it is hereby, denied, and that the complaint be, and it is hereby, dismissed, the defendants to recover their costs of the plaintiff, and that this case be stricken from the docket.

Appeals Court Opinion

SOPER, Circuit Judge:

Charles E. Williams, an attorney in the Internal Revenue Service of the United States, brings this suit on his own behalf and on behalf of all others similarly situated against Howard Johnson's Restaurant in the City of Alexandria, Virginia, complaining that he was wrongfully refused service by the restaurant on the morning of April 20, 1958, because he is a Negro. He seeks a declaratory judgment that his exclusion on racial grounds amounted to discrimination against a person moving in interstate commerce and also interference with the free flow of commerce in violation of the Constitution of the United States,

as well as a violation of the Civil Rights Acts of 1875, 18 Stat. 335. He prays for an injunction restraining the defendant from denying him and persons similarly situated access to the restaurant and also a money penalty for the infraction of the statute. On motion of the defendant his suit was dismissed by the District Court. Notwithstanding the substantial inconvenience and embarrassment to which persons of the Negro race are subject in the denial to them of the right to be served in public restaurants, the dismissal of the suit was in accord with the decisions of the Supreme Court of the United States and other federal courts.

[Civil Rights Act of 1875]

Sections 1 and 2 of the Civil Rights Act of 1875, upon which the plaintiff's position is based in part, provided that all persons in the United States should be entitled to the full and equal enjoyment of accommodations, advantages, facilities and privileges of inns, public conveyances and places of amusement, and that any person who should violate this provision by denying to any citizen the full enjoyment of any of the enumerated accommodations, facilities or privileges should for every such offense forfeit and pay the sum of \$500 to the person aggrieved. The Supreme Court of the United States, however, held in Civil Rights Cases, 109 U.S. 3, that these sections of the Act were unconstitutional and were not authorized by either the Thirteenth or Fourteenth Amendments of the Constitution. The Court pointed out that the Fourteenth Amendment was prohibitory upon the states only, so as to invalidate all state statutes which abridge the privileges or immunities of citizens of the United States or deprive them of life, liberty or property without due process of law, or deny to any person the equal protection of the laws; but that the amendment did not invest Congress with power to legislate upon the actions of individuals, which are within the domain of state legislation. The Court also held that the question whether Congress might pass such a law in the exercise of its power to regulate commerce was not before it, as the provisions of the statute were not conceived in any such view (109 U.S. 19). With respect to the Thirteenth Amendment, the Court

held that the denial of equal accommodations in inns, public conveyances and places of amusement does not impose the badge of slavery or servitude upon the individual but, at most infringes rights protected by the Fourteenth Amendment from state aggression. It is obvious, in view of this decision, that the present suit cannot be sustained by reference to the Civil Rights Act of 1875.¹

[State Action Alleged]

The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the states from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the state which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage;² he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to

prohibit unjust discrimination in the use and enjoyment of the facilities.

This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law they do not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelly v. Kraemer*, 334 U.S. 1; 68 S.Ct. 836, 842:

"Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. (Emphasis supplied)

[Interstate Commerce Clause Invoked]

The plaintiff makes the additional contention based on the allegations that the defendant restaurant is engaged in interstate commerce because it is located beside an interstate highway and serves interstate travelers. He suggests that a Federal policy has been developed in numerous decisions which requires the elimination of racial restrictions on transportation in interstate commerce and the admission of Negroes to railroad cars, sleeping cars and dining cars without discrimination as to color; and he argues that the commerce clause of the Constitution (Article 1, Section 8, Clause 3), which empowers Congress to regulate commerce among the states, is self-executing so that even

1. Even if the Act of March 1, 1875, were valid, it would not support the plaintiff's case since it covers only inns, public conveyances and places of amusement. It has been held in Virginia, *Alpaugh v. Wolverson*, 184 Va. 943, in a case which did not involve race relations, that a restaurant owner is not an innkeeper charged with the common-law duty to serve everyone who applies. The Court said at page 948:

"A restaurant, on the other hand, is an establishment where meals and refreshments are served. 28 Am. Jr., Innkeepers, §10, p. 545; 43 C.J.S., Innkeepers, §1b, p. 1132.

"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 Am. Jr., Innkeepers, §120, p. 623; 43 C.J.S., Innkeepers, §20b, p. 1169. His rights and responsibilities are more like those of a shopkeeper. *Davidson v. Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N.W. 967, 969, L.R.A. 1918E, 704. He is under no common-law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. *Nance v. Mayflower Tavern (Utah)*, 150 P.2d 773, 776; *Noble v. Higgins*, 95 Misc. 328, 158 N.Y.S. 867, 868."

2. See Code of Virginia, 1950, Title 58, §§196, 325, 326, 390, 396; Title 18 §§327, 328.

without a prohibitory statute no person engaged in interstate commerce may place undue restrictions upon it.

The cases upon which the plaintiff relies in each instance disclosed discriminatory action against persons of the colored race by carriers engaged in the transportation of passengers in interstate commerce. In some instances the carrier's action was taken in accordance with its own regulations, which were declared illegal as a violation of paragraph 1, section 3 of the Interstate Commerce Act, 49 U.S.C. 3(1), which forbids a carrier to subject any person to undue or unreasonable prejudice or disadvantage in any respect, as in *Mitchell v. United States*, 313 U.S. 80, and *Henderson v. United States*, 339 U.S. 816. In other instances, the carrier's action was taken in accordance with a state statute or state custom requiring the segregation of the races by public carriers and was declared unlawful as creating an undue burden on interstate commerce in violation of the commerce clause of the Constitution, as in *Morgan v. Virginia*, 328 U.S. 373; *Williams v. Carolina Coach Co.*, D.C., Va.,

111 F.Supp. 329, affirmed 207 F.2d 408; *Fleming v. S. C. Elec. & Gas Co.*, 4 Cir., 224 F.2d 752; and *Chance v. Lambeth*, 4 Cir., 186 F.2d 879.

[Interstate Commerce Clause Inapplicable]

In every instance the conduct condemned was that of an organization directly engaged in interstate commerce and the line of authority would be persuasive in the determination of the present controversy if it could be said that the defendant restaurant was so engaged. We think, however, that the cases cited are not applicable because we do not find that a restaurant is engaged in interstate commerce merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state. As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above and, thus, is at liberty to deal with such persons as it may select. Our conclusion is, therefore, that the judgment of the District Court must be affirmed.

Affirmed.

REAL PROPERTY

Restrictive Covenants—Florida

B. J. HARRIS and Paula Harris, his wife, v. SUNSET ISLANDS PROPERTY OWNERS, INC.

Supreme Court of Florida, April 8, 1959.

SUMMARY: A Jewish couple bought a lot in the "Sunset Islands" subdivision in Dade County, Florida, despite restrictive covenants of record specifying that until 1972 no lot therein was to be sold to or occupied by anyone not a member of Sunset Island Property Owners, Inc. At that time the corporation's by-laws provided that no corporation member would, prior to 1966, sell or lease any property in the subdivision to any person "not of the Caucasian race, or who is not a Gentile, or who has been convicted of a felony," and that the same factors were "the only ground upon which an owner or lessee of property on said Islands may be denied membership in this corporation." A house was built on the lot and occupied by the Jewish family, whereupon a suit was filed by the corporation in a state circuit court to compel them, as non-members, to vacate. Subsequently, the corporation's by-laws were amended to eliminate references to Caucasians, Gentiles and felons, and to make "good moral character" and owning or leasing (or purposing to do so) of Sunset Islands property the qualifications for membership. The Jewish couple then applied for membership but were rejected. The Circuit Court held that the couple, having failed to become corporation members, were subject to the restrictions and that they must sell and vacate. On appeal,

the Florida Supreme Court reversed, holding that the covenants, having the effect of prohibiting the purchase and occupancy of described land by a Jew, were not judicially enforceable under the doctrine of *Shelley v. Kraemer* [334 U.S. 1 (1948)] and that such enforcement of those restraints constitutes state action violative of the equal protection clause of the Fourteenth Amendment. It was also held that the couple were not bound by the by-law amendments made after they had acquired their property rights.

THORNAL, J.

Appellants Harris, who were defendants below, seek reversal of a decree of the Chancellor affirming the validity of certain covenants restricting the sale and occupancy of land.

We are called upon to determine whether the covenants in question can be enforced in view of the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting state action which denies equal protection of the laws.

Mr. and Mrs. Harris purchased a lot in a subdivision known as Sunset Islands in Dade County. At the time of the purchase there was of record certain restrictive covenants affecting the sale and occupancy of the property. Among these were the following:

"2. OWNERSHIP. No lot (nor any part thereof) shall be sold, conveyed or leased to anyone not a member in good standing of Sunset Islands Property Owners, Inc., a Florida corporation, Provided, however, that nothing in this covenant contained shall prevent any corporation, a majority of the stock in which is owned by members in good standing of Sunset Islands Property Owners, Inc., from owning or leasing any such property.

"3. OCCUPANCY. No lot (nor any part thereof) shall be used or occupied by anyone not a member in good standing of Sunset Islands Property Owners, Inc. The provisions of this covenant shall not apply to bona fide domestic servants domiciled on the premises where they are employed."

[Corporation Membership Restrictions]

Similar restrictions covered all of the property in the subdivision and it was provided that they should remain in full force until 1972. When appellant Harris purchased the land the by-laws of appellee Sunset Islands Property Owners, Inc., contained a provision which in sum provided that no member of the corporation would, prior to the year 1966, sell or lease any property

in the subdivision to any person "not of the Caucasian race, or who is not a Gentile, or who has been convicted of a felony, . . ." The by-laws further provided that "the only ground upon which an owner or lessee of property on said Islands may be denied membership in this corporation shall be that the applicant is not a Gentile or is not of the Caucasian race or has been convicted of a felony."

It will be seen that when Harris, a Jew, purchased the property the recorded restriction required that he be a member of the appellee nonprofit corporation. The membership application blank which contained an excerpt from the by-laws on the reverse side specifically excluded him from membership in the corporation because of his religion. With this information he, nevertheless, proceeded to construct an expensive residence on the land, and with his family assumed occupancy. At this point, the appellee Sunset Islands Property Owners, Inc., filed suit to compel Harris to vacate the property alleging that he was not a member of the corporation. It should be pointed out that subsequent to the filing of the complaint the by-laws of the corporation were amended by eliminating the references to Caucasians, Gentiles and felons. In lieu thereof there was substituted a provision to the effect that "the qualifications for membership in this association shall be that the member be of good moral character, that he be an owner or lessee, or one who proposes to become an owner or lessee, of property on Sunset Islands No. 1 or No. 2." Pending the litigation, and after the aforesaid amendment, appellants, deeming themselves to be of good moral character, applied for membership and were rejected. When the matter came on for final hearing, the Chancellor by his decree indicated the view that the only restriction which he was being requested to enforce was that which merely required membership in the corporation. He had the view that this was not an unreasonable requirement and that having failed to become a member of the corporation, the appellants were subject to the restrictions. By his decree he ordered the appellants to sell their property to

the appellee corporation and provided that if they could not agree on the price, then the appellants should sell and the appellee should pay an amount fixed by three appraisers named by the court. Of course, the appellants were ordered to vacate the property. Reversal of this decree is now sought.

[Unlawful Restraint Charged]

Appellants contend that the restriction requiring membership in the corporation supplemented by the by-law requiring that in order to be a member a person would have to be a Caucasian Gentle, constituted an unlawful restraint on the alienation of the property and that the enforcement thereof denied to them the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellee contends that the Chancellor ruled correctly in finding that he was merely called upon to sustain the restriction which required membership in the corporation as a condition to ownership and occupancy of the property. Appellee says that under the by-laws, as amended, stipulating as the sole condition to membership good moral character of the applicant, the appellants had applied for membership and in good faith had been rejected.

It appears to us to be perfectly clear that when appellants Harris bought the land in question, the restriction, if valid, would preclude them from purchasing the property or from ever occupying it. We are aware of the fact that the recorded restriction itself merely required membership in the corporation. However, it is impossible to disregard the specific requirements of the by-laws that in order to become a member of the corporation one must be a Caucasian Gentle and innocent of any prior conviction of a felony. Conversely stated Mr. Harris, being a Jew, could not possibly become a member of the corporation under then existing by-laws. The record, incidentally, clearly sustains the fact that the provision excluding felons has no materiality here and we do not discuss it further.

[Shelley v. Kraemer Relied Upon]

We are thus confronted with a twenty-five-year restrictive covenant, the effect of which is to prohibit the purchase or occupancy of described land by a Jew. Until May 3, 1948, re-

strictions of this nature were generally considered by the state courts to be subject to enforcement by judicial decree. On the significant date last mentioned the Supreme Court of the United States announced its decision in *Shelley v. Kraemer and McGhee v. Sipes*, 334 U.S. 1, 92 L.Ed. 845 S. Ct. 636, 3 A.L.R. 2d 441. This decision has been generally accepted throughout the country for more than ten years. It has been cited more than ninety times by various courts throughout the land. It has also been the subject of many law review articles.

Cf. *Racial Restrictions and the Fourteenth Amendment*, William R. Ming, Jr., Vol. 16, *Chicago Law Review*, No. 2, pg. 203; also 39 Cal. L. Rev. 493. In *Shelley v. Kraemer*, supra, the Supreme Court specifically held that the right to own, use, occupy and dispose of property is a privilege guaranteed to a citizen within the contemplation of the provisions of the Fourteenth Amendment to the Constitution of the United States. It was further held that although covenants of the nature here under discussion are not inherently void in the sense that they cannot be respected by parties as between themselves, they are nevertheless restraints on the constitutionally guaranteed right to acquire and occupy property. When, therefore, a state court on the petition of one who seeks to enforce such covenants undertakes to inject judicial validity into the restriction and thereby through the medium of a judicial decree enforces the restriction in violation of the rights of the property owners, such action by the state court constitutes state action violative of the equal protection provisions of the Fourteenth Amendment. *Shelley v. Kraemer*, supra, recognized that a state can act only through its executive, legislative or judicial branches. Insofar as the proscriptions of the Fourteenth Amendment are concerned, effective action by the states through any one of the three branches which results in a denial of equal protection of the laws is prohibited.

[Property Rights Here Protected]

We could elaborate extensively on the rule of *Shelley v. Kraemer*, supra, in the light of many subsequent decisions in the state and federal courts as well as almost innumerable articles in the law reviews as mentioned above. Our investigation fails to reveal any breach in the armor which that decision constructs as a protection to the property right here under dis-

cussion. The rule of *Shelley v. Kraemer*, supra, has become so thoroughly grounded in the decisions of the state courts around the country as well as in the courts of the federal system that only a total blindness to the compelling and controlling aspects of the decision would enable us to avoid it. In consequence of what we are compelled to recognize as a controlling rule of law it is clear that when the appellants acquired the property in question, the restrictive covenants asserted by the appellee in the current litigation constituted restraints on the alienation and use of property in disregard of the organic right of the appellants to acquire and occupy it. When appellee successfully undertook to obtain the decree of the state court to enforce this restraint, it accomplished an act which in effect denied to the appellants the equal protection of the laws and in so doing inspired state action proscribed by the Fourteenth Amendment.

We do not overlook the contention of the appellee that it amended its by-laws after the institution of the litigation by eliminating the objectionable provisions which specifically precluded Jews from membership. When the subsequent application of the appellants was considered by the directors it was rejected. Again, the law requires us to point out that when the appellants acquired the property the then-applicable restrictions were totally invalid. Inasmuch as the appellants could not and did not then become members of the corporation, ob-

viously they could not and were not bound by amendments to the by-laws accomplished without their consent more than a year after they acquired their property rights.

[Scope of Decision]

We caution that we are not here holding that the requirement of membership in the corporation and limiting membership to people of good moral character, as stipulated in the amended by-laws, is in and of itself a prohibited restraint on alienation. Required membership untainted by religious exclusions might in another setting be perfectly legitimate. The corporation by its charter appears to have laudable and useful functions that could be of service to its members. We are not here called upon to determine whether the requirement of membership in the corporation as governed by the amended by-laws constitutes a valid and enforceable covenant. All that we here determine is that the original requirement of membership in the specific exclusion of Jews constituted an illegal and unenforceable restraint on these appellants at the time that they acquired the property. As to them the requirement could not be enforced. This opinion is not to be given any broader interpretation.

The decree of the Chancellor is—

REVERSED.

TERRELL, C. J., HOBSON, DREW and O'CONNELL, JJ., concur.

TRANSPORTATION

Passenger Seating—Alabama

Viola CHERRY et al. v. J. W. MORGAN et al., Individually and as Members of the Board of City Commissioners of the City of Birmingham, Alabama, and Birmingham Transit Company.

United States Court of Appeals, Fifth Circuit, May 27, 1959, 267 F.2d 305.

SUMMARY: A class action was brought in a federal district court in Alabama requesting both a declaratory judgment that a Birmingham ordinance requiring segregated seating on buses was unconstitutional and an injunction against the enforcement of the ordinance. When two weeks prior to the trial the city repealed that ordinance and enacted a new ordinance apparently delegating the regulation of seating to the bus company, plaintiffs moved to file a sup-

plemental complaint challenging the constitutionality of the new ordinance. The motion was overruled, the court dismissing the action as moot without prejudice to plaintiffs' rights to reassert in an appropriate proceeding the matters contained in their supplemental complaint.

—F. Supp.—, 3 Race Rel. L. Rep. 1236 (N.D. Ala. 1958). On appeal, the Court of Appeals for the Fifth Circuit affirmed, holding that the district court had not abused its discretion in denying leave to file the supplemental complaint.

TRIAL PROCEDURE

Complaint Dismissals—California

PEOPLE of State of California v. John WINTERS et al., Melvin Chambers.

Appellate Department, Superior Court, Los Angeles County, California, June 30, 1959, 342 P.2d 538.

SUMMARY: Twenty-eight Negroes, charged with gambling offenses, appeared for trial in a Los Angeles, California, municipal court. Without trial the judge reprimanded defendants, stating that he thought each was guilty as charged, and then dismissed the cases "because of the reason I believe that it constitutes discriminatory enforcement." The judge noted that he had previously written the Chief of Police that he believed the gambling laws were being enforced mainly against Negroes, that the Chief had taken exception in a statement citing statistics that some 10% of those arrested for gambling were white persons, but that the court refused to believe that 10% of the city's population (Negroes) were doing 90% of the gambling. Under a statute providing that the court may "in furtherance of justice" order an action dismissed, minute orders stating the reasons for dismissals were entered: "Dismissed as to (naming defendant) in interest of justice." The prosecution appealed to a state superior court, which held the minute orders, failing to state why the dismissals were in the interest of justice, did not meet the statutory requirement. The court would not agree to an amendment by the trial court to incorporate the statements made orally upon the dismissals, because such amounted only to the judge's predilections, and indicated an abuse of discretion in acting on his extrajudicial belief that there had been intentional unequal enforcement. The order of dismissal was reversed without prejudice to defendant's right at the retrial to allege and offer proof that conviction would constitute a denial of equal protection of the laws because of intentionally discriminatory law enforcement.

DAVID, Judge.

This is one of ten cognate cases, involving a total of twenty-eight defendants, of whom Melvin Chambers is one. The complaints charged the defendants with violations of California Penal Code sec. 330, making illegal, among others, the game of stud horse poker; of Los Angeles Municipal Ordinance 36674 (N.S.), prohibiting certain games not included in Pen. Code, sec. 330; and of Los Angeles Municipal Code (Ord. No. 77,000) sec. 43.13.2, prohibiting visits to a place where gambling is carried on.

The defendants were duly arraigned, and entered pleas of "not guilty." Prior to March 5, 1959, some defendants named in the complaints had been tried, convicted and fined; some others had entered pleas of "guilty" but on the morning of March 5, 1959, were permitted to change their pleas to "not guilty." The cases were called for trial and it was determined they were ready for trial. The defendants to be tried were present, with counsel, and the People were represented by counsel. Without any other preliminaries, the court requested the defendants to step inside the bar, made the statements which are

hereinafter related, and terminated the cases, saying, "I am dismissing these cases, and I am dismissing them because of the reason that I believe that it constitutes discriminatory enforcement." The People have appealed from such order of dismissal in each case.

Beyond doubt, where the laws have been enforced in a discriminatory manner, with the intent and purpose to deny the equal protection of the law to any persons or group of persons, a discriminatory enforcement of a statute fair on its face when established by adequate proof may invalidate an otherwise proper conviction. This is an appeal from a dismissal of an action without putting intentional discrimination in issue, and without the receipt of proof in an adversary trial.

[Trial Judge's Dismissal Statement]

The reporter's transcript reflects the following proceedings:

"Court: I want the following defendants to step forward, come inside the rail:

"Warner Isadore, Matthew Harrison, Roy Benson, William Flowers, George Barton, Isaac Johnson, Wilhem Ford, Alvin Armstrong, James Hutcherson, James Allen, John Hall, Craig Wilson, Oliver Moss, Leonido Easter, Prince Clay, Eural Bradford, Robert Lewis, Edward J. Davis, Melvin Chambers, Leon Scott, Marion Thomas, Frank Warren, Burrell Ford, Arthur Wilson, Hayne Chick, Roosevelt Jones, Edgar Askey, John Millender.

"Some three weeks or a month ago, this Court had the occasion to write a letter to the Chief of Police calling attention to the fact that, in this Court's opinion the gambling laws of this city are enforced mainly against members of the Negro race.

"The Chief took exception to that statement and pointed out, by his statistics, that in the last two years 12,000 Negroes were arrested for gambling and 1,200 Caucasians. Of course, I know that the figures are deceptive because of the fact that the 1,200 Caucasians mentioned were arrested in areas other than the Central Los Angeles area: In Van Nuys and San Pedro and other areas.

"But, I also take great exception to what I term a discriminatory pattern of enforcement of the gambling laws of this city. It

is my opinion they are enforced mostly against members of the Negro race. If I were to take the Chief's figures as they speak to this, it would lead me to believe that Negroes, who constitute 10% of the population of this city, are responsible for 90% of the gambling in this city. I refuse to believe that as the truth. I refuse to believe that the people who make their money off of gambling in this city are making it from the penny-ante gambling that goes on in Negro homes and Negro districts.

"The Chief has also invited me to point out to him instances where gambling is going on unraided. Of course, I don't have to do that because that isn't my job. That is his job to ferret out gambling.

"But, I only have to say that gambling is going on in all sections of our city: All private clubs; it is going on in fraternal organizations; it is going on in every fight stadium on fight night in the first few rows of the ringside. Where men wave dollar bills at each other openly and notoriously, and under the view of the very officers that are present. And the exchange of money at the end of the bout—I strongly suspect it must be gambling.

"And I find some comfort in the case of *People v. Gordon*, recorded in 105 Cal. App.2d, District Court of Appeals—The page number is quite significant—page 711 [234 P.2d 287]—Where that Court, on passing on another type of case, states that the deliberate or intentional discriminatory enforcement of the statute is a denial of the proper equal protection guaranteed by the Constitution.

"I take the view in this case, where, in one morning, we have twenty-five defendants that are here are all of one race, that constitutes nothing more, and nothing less, than discriminatory enforcement of the law.

"I am dismissing these cases, and I am dismissing them because of the reason that I believe that it constitutes discriminatory enforcement.

"This, of course, is not to say to these defendants that this Court is granting any license or privilege for you to go out and gamble. Because, I am against gambling in all its forms. But, I hope that the Chief will arrest you again if you go out and repeat

your act of gambling. Because, I think that each and everyone of you are guilty of what you are here charged with. But, you are no guiltier than others who go unraided and do the same thing.

"I am not going to stand by and let these things go unnoticed."

"(Applause by Court spectators.)"

[Statutory Provisions for Dismissal]

Penal Code sec. 1385 provides: "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

Penal Code sec. 1387 provides: "An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony."

The minute order in each of these cases reads: "Dismissed as to (naming defendant) in interest of justice"; or (in one case): "Dismissed as to all defendants in interest of justice."

A dismissal for any cause by a municipal court, including a dismissal in reliance upon Penal Code sec. 1385, is appealable by the People so long as the defendant has not been placed in jeopardy, Penal Code sec. 1466; *People v. Baxter*, 1953, 119 Cal.App.2d 46, 50, 258 P.2d 1093; cf. *People v. Ring*, 1957, 26 Cal.App.2d Supp. 768, 70 P.2d 281; *People v. Banat*, 1940, 39 Cal. App.2d Supp. 765, 100 P.2d 374.

In Penal Code sec. 1469, the powers of this reviewing court are stated: "Upon appeal by the people the superior court may review any question of law involved in any ruling affecting the judgment or order appealed from, without exception having been taken in the trial court. . . . The superior court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial. . . ."

[Dismissals Subject to Review]

It will appear, therefore, that in contrast to the uncontrolled discretion of a trial judge in a

superior court, under Penal Code sec. 1385, the exercise of such a great power is fully subject to review upon appeal when an order of dismissal is made in the municipal court.

Even where the power of review is more limited, the appellate courts have not hesitated to state that dismissals made by trial judges under Penal Code sec. 1385 have been an abuse of discretion, in view of the reasons which have been assigned to justify them.

In a gambling case, *People v. Valenti*, 1957, 49 Cal.2d 199, 316 P.2d 633, a witness interrogated by the judge in chambers stated he had arrested the defendant at night without a warrant, and thereafter had seized certain real evidence. As stated in the opinion, (49 Cal.2d at page 202, 316 P.2d at page 634): "Without motion by or suggestion of either counsel, the judge ruled as follows: 'The Court is going to dismiss the information. I feel there was sufficient information that, had the Sheriff's Department wanted to obtain . . . a warrant . . . they could have done so and then that there would have been no question as to illegal [arrest and] search and seizure. . . . I am dismissing the information at this time for insufficiency of the evidence, . . . based on the lack of reasonableness of the arrest.' . . . The jury were discharged. The minutes state that the order is one 'dismissing said Information on the grounds of illegality of the arrest of the defendant.' Reviewing this order, the Supreme Court affirmed the dismissal. It held that the defendant could not be retried, because he had been placed in jeopardy, and that in the Superior Court a dismissal under Penal Code sec. 1385, was not appealable. Nevertheless, it devoted many lines to the characterization of the judge's action (49 Cal. 2d at page 204, 316 P.2d at page 635) as 'egregiously erroneous.'"

In *People v. Disperati*, 1909, 11 Cal.App. 469, 472, 105 P. 617, 618, the district attorney made a motion to dismiss a case in furtherance of justice after the jury disagreed. The motion was made on the grounds, among others, that it was important to apprehend the defendant's accomplices; and that "the trial of this action will be very expensive, and might burden the county general fund; that money due for other county expenses and contracts might thus be consumed, thereby causing *bona fide* claimants to lose their legal rights . . ." The trial court granted the motion. The appellate court stated, (11 Cal. App. at page 476, 105 P. at page 619): "The

legislature has not attempted to define the expression 'in furtherance of justice,' and therefore it is left for judicial discretion, exercised in view of the constitutional rights of the defendant and the interests of society, to determine what particular grounds warrant the dismissal. As far as the depleted condition of the treasury is concerned, we cannot give our adherence to the view that this is a sufficient ground for the course pursued. * * *

[Reasons for Dismissal Required]

Pen.Code sec. 1385 requires that the minute order must set forth the reasons for the dismissal. We have no authority to disregard this requirement or to hold that it is merely directory. *People v. Disperati*, supra, 11 Cal.App. 469, 476, 105 P. 617, 619. Here, there is no pretense that the minute order of the court recited the reasons on which it was based. It is true the reporter's transcript shows the trial court's motivation for the action, but the *minutes* do not reflect the reasons why the dismissals were "in the interest of justice."

As was said in *People v. Disperati*, supra, 11 Cal.App. 469, 477, 105 P. 617, 620: "It is to be observed that this is no 'technical' objection to the proceedings, as the term 'technical' is commonly understood, but it relates to an important rule of procedure which the Legislature has provided for the guidance of the courts, and the omission to observe it cannot be held to be innocuous without an invasion of the authority of a co-ordinate branch of the government. If the practice of which complaint is made is to be continued, it is manifest that great abuse is likely to follow, more dangerous to society than even the acquittal of the guilty."

A judge dismissing criminal charges without trial, upon his own motion, must record his reasons so that all may know why this great power was exercised, and such public declaration is indeed a purposeful restraint, lest magistral discretion sweep away the government of laws.

[Permission to Amend Urged]

We have been urged to permit the trial court to amend the minute order, to incorporate therein the substance of the judge's statements. If the minute order incorrectly or insufficiently states the action of the court, the trial court itself has the power to amend it, to conform to the order

actually made. But it is clear that the inclusion of any or all of the reported statements would not infuse validity into the invalid order, which under the circumstances exceeded the discretion confided in the municipal court under Pen.Code sec. 1385.

A dismissal "in furtherance of justice", upon review, must show that there has been the exercise of a valid legal discretion, amounting to more than the substitution of the predilections of a judge for the alleged predilections of the peace officers. It is an abuse of discretion for a judge without a hearing to hold there is deliberate or intentional unequal enforcement, since in all cases it is presumed that official duty has been fully and regularly performed by the public authorities until there is judicial proof to the contrary.

The basic question is, "Are defendants guilty?", not whether there are other lawbreakers who have escaped detection and punishment, cf. *Morgan v. Sylvester*, D.C.1954, 125 F.Supp. 380, 387; *Saunders v. Lowry*, 5 Cir., 1932, 58 F.2d 158, 159; *People v. Hess*, 1951, 104 Cal.App.2d 642, 685, 234 P.2d 65, appeal dismissed 342 U.S. 880, 72 S.Ct. 177, 96 L.Ed. 661.

Upon trial, defendants are entitled to present proof, if any, that there has been intentional discrimination, based on any improper consideration.

[Discriminatory Enforcement Not Presumed]

Discriminatory law enforcement, to constitute a want of due process of law, and a denial of the equal protection of the laws, must be intentional, and purposeful. It will not be presumed, and before it can be established, proof thereof must be judicially made. In *Snowden v. Hughes*, 1943, 321 U.S. 1, 8-9, 64 S.Ct. 397, 88 L.Ed. 497, 401, it is said: "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. * * * But a discriminatory purpose is not presumed * * *. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. [citing cases] But a mere showing that negroes were not included in a particular jury is not enough; there

must be a showing of actual discrimination because of race. * * *

In *Ah Sin v. Whittman*, 1905, 198 U.S. 500, 506, 25 S.Ct. 756, 49 L.Ed. 1142, wherein it was claimed that Chinese were discriminated against in enforcement of the San Francisco gambling ordinance, the refusal of habeas corpus by the California court was affirmed. It was pointed out that the doctrine of *Yick Wo v. Hopkins*, 1886, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220, 227, related to lawful, and not unlawful, activities. Speaking of discriminatory enforcement, the Court stated at page 508 of 198 U.S., at page 759 of 25 S.Ct.: "This is a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state."

[Authorities Cited]

In *People v. Flanders*, 1956, 140 Cal.App.2d 765, 296 P.2d 13, the trial court on its own motion set aside a portion of a grand jury indictment charging defendant with conspiracy to violate the gambling laws. From the opinion it appears (140 Cal.App.2d at page 767, 296 P.2d at page 14): "It is appellant's contention * * * that the court erred in holding that it was a denial of equal protection of the law to prosecute some while others escaped prosecution for breaking the same laws. * * * After further discussion of the evidence required to constitute a conspiracy the court stated that his reason for dismissing the conspiracy charge was aside from that, stating that he could take judicial notice of the fact that similar offenses were practiced widespread in San Francisco referring to church 'bingo' lotteries which were allowed to run without interference and which were even advertised. He cited the case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, to the effect that if the law is administered so as to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is within the constitutional prohibition. The court admitted that the record before the Grand Jury did not show that other forms of gambling were being conducted widespread throughout San Francisco in practically every parish. No proof was offered by respondent either at the hearing or before the Grand Jury that there was discrimination practiced in the enforcement of the gambling law. This issue was

interjected by the court. The court stated that he could take judicial notice of the fact that such offenses were practiced by church organizations and were even advertised. * * * The appellate court continued (140 Cal.App.2d at pages 769-770, 296 P.2d at page 16): "Even if it be assumed that it is proper to raise the question of discriminatory enforcement of the gambling laws on a motion made under section 995, it appears that the rule of the case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 does not stand for the proposition that persons violating the law are to have equal protection from prosecution, but rather for the proposition that equal protection of the law will be extended to all persons in pursuit of their lawful occupations regardless of their race. * * * In *People v. Darcy*, 59 Cal.App.2d 342, 139 P.2d 118, 125 the same argument based on the *Yick Wo* case was raised, as is now urged by respondent herein. The court there stated that if such an argument was accepted it would lead to the rule that 'if some guilty persons escape, others who are apprehended should not be prosecuted.' * * * In *People v. Montgomery*, 47 Cal.App.2d 1, 117 P.2d 437, 446, it was observed that appellant therein argued that 'equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons.' The court noted that the remedy for unequal enforcement of the law 'does not lie in the exoneration of the guilty at the expense of society.' It commented on the *Yick Wo* case, stating that there was an obvious distinction between extending protection to persons of the Chinese race in pursuance of the business of laundering, and extending protection to those engaged in pandering, and that while equal protection will be extended to all in the pursuit of lawful occupations, no one has the right to demand protection in the commission of a crime. The court concluded that the only possible extension of the doctrine of the *Yick Wo* case to a criminal matter would be an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime. It was also noted in that case that appellant therein had not attempted to defend on the basis of discriminatory enforcement of the law even if such a defense were available to him." The appellate court reversed the order of dismissal.

[Other Precedents]

In *People v. Van Randall*, 1956, 140 Cal.App. 2d 771, 296 P.2d 68, the trial court dismissed charges of violating gambling laws, after indictment by the grand jury, and the other was reversed on appeal since the trial court acted of its own motion, without proof, in respect to alleged discriminatory enforcement. It is said such a question cannot be raised by motion to dismiss, where the law itself is not alleged to be unconstitutional (140 Cal.App.2d at pages 776-777, 296 P.2d at page 72, wherein the court stated it was "the duty of the court below . . . to test the evidence . . .").

In *People v. Darcy*, 1943, 59 Cal.App.2d 342, at page 353, 139 P.2d 118, at page 125, it is stated: "Appellant sought to inject a false issue into the trial of the charge, which, if approved, could easily lead to a rule that if some guilty persons escape, others who are apprehended should not be prosecuted. . . . Among other defenses appellant sought, by way of offer of proof, an acquittal upon the claim that others equally guilty had not been prosecuted and that he had been prosecuted because he is a communist. The first claim would be equally meritorious if presented in connection with a traffic violation, and the second would establish a precedent that nationality, race or creed might be used in all criminal cases as a defense. Both claims would simply cloud the real issue. . . ."; citing *People v. Montgomery*, 1941, 47 Cal.App. 2d 1, 117 P.2d 437.

This appellate department, in *People v. Sipper*, 1943, 61 Cal.App.2d Supp. 844, at page 848, 142 P.2d 960, at page 963, in respect to a cognate contention, stated: "As was pointed out in *People v. Montgomery*, 1941, 47 Cal.App.2d 1, 14, 117 P.2d 437, 446, 'It should be borne in mind that in the *Yick Wo* case the equal protection of the law was extended to persons of a particular race to enable them to engage in a lawful business on a basis of equality with all other persons. Appellate now in effect argues from this that equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons. While all persons accused of crime are to be treated on a basis of equality before the law, it does not follow that they are to be protected in the commission of crime. It would be unconscionable, for instance, to excuse a defendant guilty of murder because others have murdered with impunity. The remedy for unequal enforce-

ment of the law in such instances does not lie in the exoneration of the guilty at the expense of society. . . . Protection of the law will be extended to all persons equally in the pursuit of their lawful occupations, but no person has the right to demand protection of the law in the commission of a crime'."

[Oreck Opinion Quoted]

In *People v. Oreck*, 1946, 74 Cal.App.2d 215, at page 221, 168 P.2d 186, at page 190, it appears: "The appellants next contend that the trial court erroneously sustained objections to certain questions aimed at showing that the police discriminated against horse race betting in that the police did not raid certain establishments specializing in election and other types of bets. Appellants did not offer to prove that they were being prosecuted because of their race, color, religion, or political beliefs. They simply sought to show that others equally guilty were not being prosecuted. They contend that under the rules announced in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Williams v. Mississippi*, 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012; and the dissenting opinion in *People v. Darcy*, 59 Cal.App.2d 342, 354, 139 P.2d 118, such facts, if proved, would demonstrate that they had been denied equal protection of the laws. In the cases cited it was claimed that the persons involved were being prosecuted because of their race, color, religion or political beliefs. . . . It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not. This is clearly pointed out in the majority opinion in the *Darcy* case, and likewise in the dissent in that case. In 59 Cal.App.2d at page 358, 139 P.2d at page 128, in the dissent it is stated: 'It is, of course, the law that a person committing a crime cannot claim an unlawful discrimination upon a mere showing that other persons or classes of persons have committed the same offense and have not been prosecuted therefor. The cases cited in the majority opinion clearly and properly establish that principle. [Citing cases.] The proffered evidence for these reasons was inadmissible.'"

[Hess Case Relied Upon]

In *People v. Hess*, supra, 104 Cal.App.2d 642, at pages 684-685, 234 P.2d 65, at page 92, appeal dismissed 342 U.S. 880, 72 S.Ct. 177, 96

L.Ed. 661, it appears: "As a further ground for reversal, appellants urge that they were denied the equal protection of the laws in that the chief right-of-way agent of the state who allegedly, 'had bought property in the path of the free-way, signed his own appraisal and the property was resold to the state at a hiked price' was not prosecuted, but that 'petty agents (appellants Rose and Hess) were singled out for prosecution'. Appellants offered an instruction that such was their contention and, that if the jury found such to be true, appellants were entitled to an acquittal. For reasons about to be advanced, the instruction was properly refused and the claim of appellants must be rejected. Aside from the fact that there is considerable evidence in the record showing no parallel between the transaction of the chief right-of-way agent with the state and the activities of appellants, the latter sought to inject a false issue into the trial of the instant case, which, as is stated in *People v. Darcy*, 59 Cal.App.2d 342, 353, 139 P.2d 118, 125, 'if approved, could easily lead to a rule that if some guilty persons escape, others who are apprehended should not be prosecuted.' It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not. *People v. Darcy*, supra, 59 Cal.App.2d at page 353, 139 P.2d at page 118; *People v. Oreck*, 74 Cal.App.2d 215, 222, 168 P.2d 186; *People v. Montgomery*, 47 Cal.App.2d 1, 11, 117 P.2d 437. The case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, and other cases by appellants are distinguishable from the case at bar, see *People v. Darcy*, supra, 59 Cal.App.2d at pages 353, 358, 139 P.2d at page 118."

The dismissals were void because the trial judge acted in a matter where he openly declared his bias and prejudgment, without disqualifying himself.

[Consideration of Society's Interests]

The "furtherance of justice" requires consideration both of "the constitutional rights of the defendant and the interests of society" represented by the People, in determining whether there should be a dismissal. *People v. Disperati*, supra, 11 Cal.App. 469, 476, 105 P. 617. The scales of justice must be kept in balance. Even as the trial judge stated of the alleged discrimination, "I am not going to stand by and let these things go unnoticed," this Court must review the fairness of the proceeding.

The trial judge revealed that he personally had charged that there was discriminatory law enforcement by the Chief of Police in an exchange of correspondence before these cases were called for trial; that he rejected the official statement in response to his charge; and acted upon his own extrajudicial belief that there was discriminatory enforcement of the gambling laws against Negroes, without receipt of evidence, or hearing.

The reporter's transcript indicates that the proceeding ended as follows: "This, of course, is not to say to these defendants that this Court is granting any license or privilege for you to go out and gamble. Because, I am against gambling in all its forms. But, I hope that the Chief will arrest you again if you go out and repeat your act of gambling. Because, I think that each and everyone of you are guilty of what you are here charged with. But, you are no guiltier than others who go unraided and do the same thing. I am not going to stand by and let these things go unnoticed. (Applause by Court spectators.)"

[Trial Judge Prejudiced]

How can it be contended on the one hand that the present arrests were discriminatory, but that defendants should be arrested by the Chief of Police if they repeat the offense? The trial judge unfortunately approached these cases with a state of mind prejudicial to a trial which would be fair to the People. He had already negated the presumption that official duty is regularly performed; but likewise, without evidence or hearing, he asserted of the defendants: "I think that each and every one of you are guilty of what you are here charged with," thereby negating the presumption of innocence. Upon the present state of the record, the defendants have not been prejudiced, but the People have been. Under such circumstances, we must hold that the court transcended the bounds of discretion. *Pratt v. Pratt*, 1903, 141 Cal. 247, 251-252, 74 P. 742; *Evans v. Superior Court*, 1930, 107 Cal.App. 372, 381, 290 P. 662. Upon retrial of this cause, the trial judge would be subject to formal disqualification, at the instance of plaintiff or defendants. C.C.P. sec. 170; *Calhoun v. Superior Court*, 1959, 51 Cal.2d 257, 331 P.2d 648; *Keating v. Superior Court*, 1955, 45 Cal.2d 440, 446, 289 P.2d 209; *Shasta Water Co. v. Croke*, 1954, 128 Cal.App.2d 760, 276 P.2d 88; *McVey v. McVey*, 1955, 132 Cal. App.2d 120, 123, 281 P.2d 898.

Pursuant to Pen.Code sec. 1469, the order of dismissal entered is reversed; and trial of the defendant is ordered to proceed; without prejudice to the right of the defendant as a matter of defense, to assert and offer proof that any

conviction would deny him equal protection of the laws because of any proven intentional or deliberate discrimination in enforcement of the law.

SWAIN, Acting P. J., and HULS, J., concur.

TRIAL PROCEDURE

Evidence—Louisiana

Edgar LABAT and Clifton Alton Poret v. Maurice SIGLER, Warden of the Louisiana State Penitentiary.

United States Court of Appeals, Fifth Circuit, June 3, 1959, 267 F.2d 307.

SUMMARY: Two Negro men were convicted and sentenced to death by a Louisiana state court on a charge of raping a white female. The Louisiana Supreme Court affirmed. 225 La. 1040, 74 So.2d 207 (1954) and 226 La. 201, 75 So.2d 333 (1954). The United States Supreme Court, on certiorari limited to an attack on the grand jury venire, also affirmed. *Michel v. Louisiana*, 350 U.S. 91, 1 Race Rel. L. Rep. 23 (1955). An application to the Louisiana Supreme Court for habeas corpus, wherein defendants alleged for the first time that they had been convicted on perjured testimony coerced by policemen, was denied. The United States Supreme Court denied certiorari but remanded the cause to a federal district court in Louisiana for further consideration, as defendants had exhausted state remedies. *Poret v. Sigler*, 355 U.S. 60 (1957). The district court discharged the writ after it had "in effect, retried petitioners," holding that it would not say that defendants had been denied due process of law. 162 F.Supp. 574, 3 Race Rel. L. Rep. 1033 (E.D. La. 1958). On appeal, the Court of Appeals for the Fifth Circuit affirmed.

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge

This is another of the all too many instances¹ in which, after exhaustive trials and proceedings in the state courts, a habeas corpus proceeding, in form urging but in truth and in fact presenting no substantial grounds for such relief, is brought in a federal district court to serve the single purpose of an additional and extraordinary motion to obtain a new trial in the state court.

While, as appears from the judgment and opinion² of the district judge, the application for relief in this case did not obtain its purpose, a new trial in the state court, it did obtain for

the applicants a full hearing in the federal court "including the testimony of twenty-four witnesses and the introduction of several documents". In this hearing, as stated in his opinion, the district judge "in effect, retried the petitioners for the offense of which they have been convicted".

Upon full consideration of the appeal in the light of the briefs and arguments and of the opinion of the district judge, we are convinced, as the district judge was, that the full and detailed hearing did not disclose any facts at all supporting plaintiffs' claims that in their trial and conviction they were denied due process.

For these reasons, therefore, apparent upon the record and correctly summarized and stated in the opinion of the district judge, the judgment is affirmed.

1. Cf. *Darr v. Burford*, 339 U.S. 200, at pages 210-211-212, 70 S.Ct. 587, 94 L.Ed. 761.

2. *Labat v. Sigler*, D.C., 162 F.Supp. 574, 575.

TRIAL PROCEDURE

Oral Argument—Alabama

Frank FLOWERS v. STATE of Alabama.

Supreme Court of Alabama, February 12, 1959, 113 So.2d 344.

SUMMARY: A Negro man was convicted and sentenced to death by an Alabama state court for the murder of his wife. The record on appeal showed that defendant's counsel moved for a mistrial at the conclusion of the deputy solicitor's opening argument on the ground, among others, that the latter had "by inference and tone referred to the present race situation which tended to do nothing more than inflame the minds of the jury against the defendant." The record did not show what had been said specifically in argument. The motion was overruled and exception taken. After the transcript of evidence had been filed, defendant seasonably filed objections to it, praying the court to cause the entire argument to become a part of it. Although a hearing concerning these objections was set, the record on appeal did not show that it had been held. However, defendant's counsel in the meanwhile filed an affidavit alleging that the solicitor had said in opening argument that "the time has come to quit treating these people [the Negro race] as children" and that "today they are enjoying equal economic status and equal educational status and they should be treated as adults and not children." The Supreme Court of Alabama affirmed the conviction, holding that failure to make the entire argument of counsel a part of the record did not deprive the defendant of due process, that the exceptions on the motion to correct the transcript were abandoned when no hearing was held, that the affidavit filed was not a proper way to raise for review objections to the oral argument, and that the motion failing specifically to point out the language deemed objectionable was in effect no more than a motion for a mistrial without assignment of grounds, and therefore non-reviewable. However, the court added its opinion that the alleged remark objected to was not "so grossly improper and highly prejudicial that neither retraction or rebuke by the trial court would have destroyed its sinister influence."

MERRILL, Justice.

This is an appeal under the statutes providing for an automatic appeal from a death sentence, Code 1940, Tit. 15, § 382 (1) et seq.

Appellant was indicted and convicted for killing his wife, Dorothy. Appellant and Dorothy lived two doors from Clara McIntosh. The State's evidence showed that appellant had given Dorothy a physical beating in the front door of their house and Clara had prevailed upon him to desist and Dorothy had come over to Clara's house for treatment of her wounds. Appellant came to Clara's house a few minutes later, left, and subsequently returned and began to stab Dorothy with a butcher knife. Five stab wounds were made on her body and she died on the floor at Clara's house. The police were called, and they arrested appellant. He made a voluntary oral and, later, a voluntary written statement that he killed Dorothy, the only provocation being that she was drunk or drinking and was spending his money. There was testimony that when appellant stabbed Dorothy the first time, she fell to the floor, that

he got astride her body and stabbed her several more times, then got up and put his foot on her body and pressed the body four or five times causing blood to spurt from the wounds he had inflicted. One of the police officers who made the arrest testified that appellant stated that "he went up there to kill her and if he had not, he would have went back and finished it."

Appellant entered pleas of not guilty and not guilty by reason of insanity. There is ample evidence in the record to support the verdict of the jury.

[Motion for Mistrial]

At the close of the opening argument of the deputy solicitor, counsel for appellant made a motion for a mistrial based upon three different statements presumably made by the solicitor in his argument. The record does not show what was said in argument, but shows the following:

"Mr. Ross: Yes, sir; the first ground is that he has by inference and tone referred to the present race situation which tended to

do nothing more than inflame the minds of the jury against the defendant, which is not one of the issues in the case, there is no proof on that subject, itself, and secondly the ground is that he instructed the jury on Wade law is the law of the State of Alabama and in the United States, he has given the jury an incorrect statement of law and another, he made reference to four different fights, four different occasions of difficulty in Clara MacIntosh's house, I don't recall in my mind of that being the proof. That is the three motions.

"The Court: Overrule your motion.
"Mr. Ross: I except."

[Specificity and Certainty Required]

We have held that where the argument of one's counsel passes beyond the bounds of legal propriety, it is the duty of opposing counsel to object specifically, and point out substantially the language deemed objectionable; and the record should disclose with reasonable certainty what was said in the court below, in order that the appellate court may review it. *Mincy v. State*, 262 Ala. 193, 78 So.2d 262; *Stephens v. State*, 250 Ala. 123, 33 So.2d 245; *Ferguson v. State*, 36 Ala.App. 358, 56 So.2d 118. The quoted motion and the grounds assigned did not meet these requirements and had no more effect than for counsel to move for mistrial without assigning any grounds therefor.

The record does disclose that within ten days after the court reporter filed the transcript of the evidence with the clerk, appellant filed objections to the transcript with the following conclusion:

"Wherefore defendant prays that this Honorable Court will cause the entire argument of both counsel in the trial of this cause, to become a part of the transcript of the trial of this cause."

A notation appears on this document that it was set for hearing by the trial judge on May 23, 1958, at 9 A.M. No other information appears. The statutes, Act No. 886, General Acts of Alabama, 1951, p. 1527, 1955 Cumulative Pocket Part, Tit. 7, § 827(1a), provides that the "hearing of objections and the ruling of the court thereon shall be concluded within a period of ninety (90) days from the date of the taking of the appeal", where no extension of time is granted

by the trial court. Here, the appeal was taken on February 28, 1958. The hearing was set within the ninety day period, but no hearing or ruling appears to have been had. Applying the same rule here as we apply to a motion for a new trial on which no action is ever taken, we must hold that the exceptions on the motion to correct the transcript will be considered as abandoned. *Bundrick v. State*, 263 Ala. 245, 82 So.2d 309; *Bass v. State*, 219 Ala. 282, 122 So. 45.

[Affidavit Filed]

The record does show that counsel for appellant filed an affidavit on May 8, 1958, which stated:

"That in the opening argument of Mr. E. C. Watson, Solicitor for the State of Alabama, who prosecuted the case for said State, Mr. Watson made substantially the following argument to the jury who was empaneled to try said cause:

"Gentlemen, the time has come to quit treating these people as children (referring to the negro race since the defendant was a person of the negro race). Today they are enjoying equal economic status and equal educational status and they should be treated as adults and not children."

[Objections Improperly Raised]

This is not the proper way to raise objections to oral argument of counsel. There was no motion for a new trial and, consequently, there was no ground of the motion which this court could review. *Jackson v. State*, 260 Ala. 641, 71 So.2d 825; *Washington v. State*, 259 Ala. 104, 65 So.2d 704. However, since the death penalty was imposed and the alleged remark of the solicitor constitutes appellant's chief complaint in brief, we do state that it is our opinion that the remark was not "so grossly improper and highly prejudicial to the opposing party as that neither retraction or rebuke by the trial court would have destroyed its sinister influence," the exception stated in *Anderson v. State*, 209 Ala. 36, 95 So. 171, 179, and many subsequent cases. In our recent case of *Iverson v. Phillips, Ala.*, 108 So.2d 168, 173, we had occasion to consider a similar remark and reached the conclusion that it did "not present a ground for reversal of the judgment of the trial court."

There is no merit in appellant's argument that

he was deprived of due process because the entire argument of counsel to the jury was not made a part of the record. Counsel for appellant concedes that he "has failed to find a case on point." There is no such requirement by either case or statutory law in Alabama.

In accordance with our duty in cases of this

character, we have examined the record for any reversible error, whether pressed upon our attention or not. We find no reversible error in the record and the judgment is due to be and is affirmed.

Affirmed.

All the Justices concur.

TRIAL PROCEDURE

Juries—Alabama

Caliph WASHINGTON v. STATE of Alabama

Supreme Court of Alabama, February 12, 1959, 112 So.2d 179.

SUMMARY: A seventeen-year-old Negro boy, on trial for first-degree murder in the Jefferson County, Alabama, Circuit Court, Bessemer Division, filed motions to quash the indictment and trial venire on the ground that his Fourteenth Amendment rights were violated in that duly qualified Negroes had been systematically and intentionally excluded from the August, 1957, jury roll and jury box from which the grand and petit juries were drawn. A member of the Jury Board, called by defendant, testified that the jury roll had been made up and some seven thousand names of persons, colored and white, living within the court's jurisdiction had been placed in the jury box, in accordance with statutory requirements. The grand jury which indicted defendant was composed of 18 persons drawn by lot from a list of 32 persons who responded to grand jury service subpoenas sent to 52 persons whose names were drawn from the jury box by the trial judge. Four Negroes were among the 32 who appeared and one of these four was drawn and served on the grand jury. The motions to quash were overruled and defendant was convicted and sentenced to death. On appeal, the Alabama Supreme Court held that reversible error had not been committed in overruling the motion to quash the indictment, there being no charge of fraud or irregular practice in the making up of the jury box and list of August, 1957. The fact that Negroes may have been excluded from prior Bessemer juries because of their race was held to be insufficient to make out a prima facie showing that Negroes had been systematically excluded from the jury box here involved. The court noted that no evidence had been adduced in the hearings on the motions to quash the trial venire but declined to pass on that matter inasmuch as the case was reversed and remanded on other procedural grounds of a non-racial nature, so that defendant would be subject to trial before a different petit jury. Excerpts from the opinion dealing with the jury selection issue follow.

LAWSON, Justice.

Act No. 333, 1953, is in pertinent part as follows:

"Section 11. The Clerk of the Jury Board shall, under the direction of the Jury Board, obtain the names of every male citizen of the County, over twenty-one and under sixty-five years of age, and his occupa-

tion, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the Jury Board.

"Section 12. Unless sooner required under the provisions of this Act, the Jury Board shall meet in the County Court House, in Birmingham, on the last Tuesday in August, 1953, and on said day each two

years thereafter, make in a well-bound book a roll containing the name of every male citizen living in the County who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the Jury board shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number, it must be given. Upon the completion of the roll the Jury Board shall cause to be prepared plain white cards, all of the same size and texture, and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on one card. When the cards have been so prepared, the Jury Board shall then segregate, remove and set aside the cards bearing the names of all jurors who served as jurors during the two years next preceeding July 15th of that year. The names of the jurors on the cards so removed shall continue on the rolls as qualified jurors, but the cards shall not then be placed in the jury box, but shall be retained as a reserve to be used as hereinafter provided. All other cards prepared as herein provided, shall then be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the Probate Judge, and if there be none in that office, the Jury Board shall deposit it in any safe or vault in the Court House to be designated on the minutes of the Board, and one of said keys thereof shall be kept by the President of the Jury Board. The other of said keys shall be kept by the Presiding Judge of the Circuit Court for the sole use of the judges of the Courts of said County needing jurors. The jury roll shall be kept securely and for the use of the Jury Board exclusively. It shall not be inspected by any one except the members of the Board or by the Clerk of the Board upon authority of the Board, unless under an order of a Judge of the Circuit Court or other court of record having jurisdiction.

"Section 13. Unless sooner required under the provisions of this Act, the Jury box now in use in the county shall continue to be used until the last Tuesday in August 1953 or until such time thereafter as the box is refilled as herein provided. Thereafter the Jury Board shall proceed to refill the box on the last Tuesday in August each two years in the manner prescribed in this Act.

"Section 14. The Jury Board shall place on the jury roll and in the jury box as herein provided the names of all male citizens of the County who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character, and sound judgment; but no person must be selected who is under twenty-one or over sixty-five years of age or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness, is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.

"Section 15. The Jury Board is charged with the duty of seeing that the name of every person possessing the qualifications prescribed by this act to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box, and they may summon and cause to attend before them any person residing within the County and examine him on oath touching the name, residence, occupation and qualification of any person residing in the County, and they may require the production of any books, papers or documents and generally to do and perform whatever acts to establish to their satisfaction that the jury roll conforms to all legal requirements. The Jury Board must not allow initials only to be used for a juror's name, but one full Christian name, or given name, shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The Jury Board shall require

the clerk of the Board to scan the registration lists and lists returned to the tax assessor, and city directory, telephone directories, and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the Jury Board to properly perform the duties required of it by this Act.

"Section 16. The Jury Board shall have performed the duties required of it by law when they have prepared a jury roll and filled a jury box otherwise in compliance with the law, consisting of the names of qualified jurors in number equal to at least six per cent of the population of said County in accordance with the latest Federal Census, and having prepared said roll and filled such box with said number of jurors, said Jury Board shall not be deemed or held to be guilty of wilful neglect of duty nor be guilty of a misdemeanor.

"Section 17. Whenever the names in the jury box are exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors; or whenever it shall appear to the Presiding Judge of the Circuit Court or Court of like jurisdiction that the jury box is so nearly exhausted as to require refilling, and the said Judge shall notify the president of the Jury Board; the said Jury Board shall thereupon place into the jury box all cards containing the names of jurors as prepared under the provisions of this Act in Section 12 and which have been withheld from the box when filled and set aside as a reserve. Provided, however, that in placing the cards held as a reserve in the box the Jury Board may delete and withhold the cards of the names of any jurors who have died or otherwise have been disqualified because of age or other reasons from serving as jurors.

"Section 18. For any court requiring grand and petit juries or petit juries, and now or hereafter established for and held in a territorial subdivision of the County, the Jury Board shall make and keep a separate roll and make and refill a separate box for that court and territorial subdivision as provided by this Act, on which roll and in which box only the names of jurors residing in that territory shall be placed, which box

shall be kept by the clerk of said court and the key thereof by the Judge of said court and all jurors for that court shall be drawn by the Judge of said court as provided in this Act from the separate jury box provided under this section, and shall be summoned as provided in this Act for summoning jurors otherwise drawn. The names of jurors whose names are required to be placed on the roll and in the box in this section provided for, shall not be placed on any other roll nor in any other box nor shall any such person be authorized or required to serve as a juror in any court outside of said territorial subdivision. If there is more than one court requiring grand and petit juries, or petit juries, established for and held in such territorial subdivision of the County, all of such courts shall procure their juries from the box in this section provided for, and this section is intended to apply to any division of a court that is held in such territorial subdivision, including the Probate Court. The preparation of a separate jury roll and the filling and refilling of a separate jury box as provided in this section shall be governed in all respects, in so far as applicable, by the same rules and regulations as are prescribed in this act for the jury roll and jury box used outside of such territorial subdivision of the County. In ascertaining the number of qualified jurors equal to six per cent of the population of such territorial subdivision, the Jury Board may consider the latest public school census of such subdivision and any other authentic data on the subject."

• • •

LAWSON, Justice.

Caliph Washington was tried for first degree murder in the Circuit Court of Jefferson County, Bessemer Division. He was convicted and sentenced to death. The case comes here under the automatic appeal statute. Act No. 249, Acts 1943, p. 217, approved June 24, 1943. See 1955 Cum. Pocket Part, Vol. 4, Code 1940, Title 15, § 382(1) et seq.

Appellant filed motions to quash the indictment and trial venire on the ground that his rights under the Fourteenth Amendment to the Constitution of the United States were violated in that persons of his race, the Negro race, duly qualified under the applicable state law to serve

as members of the grand jury and of the petit jury, were systematically and intentionally excluded from the jury roll and the jury box from which the grand and petit juries were drawn.

In a long line of cases going back many years, the Supreme Court of the United States has held that a criminal defendant is denied the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race. *Eubanks v. State of Louisiana*, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991, and cases cited. Decisions of this court are to the same effect. *Norris v. State*, 229 Ala. 226, 156 So. 556; *Millhouse v. State*, 232 Ala. 567, 168 So. 665; *Vaughn v. State*, 235 Ala. 80, 177 So. 553; *Vernon v. State*, 245 Ala. 633, 18 So.2d 388. See *Fikes v. State*, 263 Ala. 89, 81 So.2d 303; *Reeves v. State*, 264 Ala. 476, 88 So.2d 561.

[Motion To Quash Proper]

It seems to be settled that a motion to quash is the proper way to challenge an indictment and a trial venire on the ground of intentional racial discrimination. *Vernon v. State*, supra; *Millhouse v. State*, supra; *Vaughn v. State*, supra.

Sections 278 and 285, Title 15, and § 46, Title 30, Code 1940, have been held to be procedural statutes, designed to prevent quashing of indictments or venires for mere irregularities and to obviate the resulting delays in the administration of justice. Those statutes do not deny to one charged with a crime the right to present for a determination the question of whether the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States have been violated. *Vernon v. State*, supra.

The State did not interpose any kind of pleading to the motions to quash, offer any evidence or raise any question as to the timeliness of the motions. The hearing on the motions proceeded as if they were timely filed and as if the State had taken issue thereon.

[Burden on Defendant]

It has been said that the burden of proof is upon the defendant to establish the racial discrimination alleged in such motions. *Akins v. State of Texas*, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692; *Norris v. State of Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; *Tarrance v.*

State of Florida, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572.

The Jury Board of Jefferson County is composed of three members whose duties are defined by the local act creating the Board. Act No. 333, Acts of Alabama, Regular Session 1953, Vol. 1, p. 387. Sections 11-18, inclusive, of that act will be set out in the report of the case.

No objection was interposed to the validity of any of the provisions of the 1953 local act, supra. See *Franklin v. State of South Carolina*, 218 U.S. 161, 30 S.Ct. 640, 54 L.Ed. 980.

It appears from the testimony of a member of the Jury Board who was placed on the stand by the defendant that the Jury Board on the last Tuesday of August, 1957, made a separate roll and refilled a separate jury box for the territorial division of Jefferson County commonly referred to as the Bessemer Cutoff, over which the Bessemer Division of the Circuit Court of Jefferson County has jurisdiction. Section 18, Local Act, supra. Approximately seven thousand cards bearing the names of jurors living within the Bessemer Cutoff were placed in the box. According to this witness, those names were selected in accordance with the provisions of the said local act, supra, and the names of colored jurors as well as white were placed in the box.

[Negro on Grand Jury]

The grand jury which indicted this defendant had a Negro on it. The grand jury, composed of eighteen persons, was drawn by lot from a list of thirty-two persons who responded to subpoenas for grand jury duty from a list of fifty-two names duly drawn from the August, 1957, jury box by the trial judge. Four Negroes were among the thirty-two persons who appeared. There is no evidence as to the race of the twenty persons whose names were drawn but who did not appear.

In view of the evidence concerning the presence of Negroes on the jury list from which the grand jury was drawn and the presence of the Negro on the grand jury, we are of the opinion that the trial court did not err in overruling the motion to quash the indictment even if it be conceded that the defendant established the fact that few, if any, Negroes had served on juries in the Bessemer Cutoff drawn from prior jury boxes, and even though it be conceded that the evidence shows the male Negro population over twenty-one years of age within the said political

subdivision to be equal to or in excess of the white male population of that age group. However, the evidence as it relates to the population ratio is far from clear.

[Prima Facie Showing]

The question before the trial court was whether the defendant made a prima facie showing of discrimination in the filling of the August, 1957, jury box. *Cassell v. State of Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244; *Fikes v. State*, 263 Ala. 89, 81 So.2d 303, reversed by the Supreme Court of the United States on another ground. See *Fikes v. State of Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246. There was no charge of any fraud or irregular practice in the method of drawing the cards from the jury box or in the making up of the jury list. There was no evidence offered to that effect. The fact, if it be a fact, that Negroes were excluded from prior jury rolls and boxes because of their race can only serve to shed light on the conduct of the members of the Jury Board in making up the jury box of August, 1957. But that fact, in our opinion, was not sufficient to make out a prima facie showing that Negroes had been systematically excluded from the jury box here involved from which the names of Negroes were drawn to serve on the grand jury which indicted the defendant. In our opinion, the facts in this case are clearly distinguishable from the facts held to constitute a prima facie showing of discrimination in the following cases. *Neal v. State of Delaware*, 103 U.S. 370, 26 L.Ed. 567; *Norris v. State of Alabama*, supra; *Hale v. Commonwealth of Kentucky*, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050; *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757; *Hill v. State of Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; *Patton v. State of Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76, 1 A.L.R.2d 1286; *Hernandez v. State of Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866; *Reece v. State of Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77. As we understand the evidence in this case, there was no "vacuum" which the State was called upon to fill by moving in with sufficient

evidence to dispel a prima facie case of discrimination. *Avery v. State of Georgia*, supra.

[Federal Question]

We realize full well that we are dealing with a federal question and that on review by the Supreme Court of the United States that court can make an independent examination of the evidence to determine whether a federal right was denied the defendant. Our conclusion here has been reached only after a careful and studied consideration of the decisions of the Supreme Court of the United States on the question, and while we are of the opinion that the conclusion which we have reached is correct, we feel that the better practice would have been for the State to have presented evidence as was done in the case of *Fikes v. State*, 263 Ala. 89, 81 So.2d 303.

We hold that reversible error is not made to appear in connection with the action of the trial court in overruling the motion to quash the indictment.

No evidence was adduced in the hearing on the motions to quash concerning the composition of the petit jury or the list from which that jury was selected. For aught appearing there were many more Negroes on that jury than were drawn for possible grand jury duty. The defendant introduced no evidence tending to show the number of whites in the jury box or on the jury roll as compared to the number of Negroes. But in any event, we see no occasion to pass on the motion to quash the venire inasmuch as the case must be reversed for a reason hereafter stated and the defendant will be subject to trial before a different petit jury.

We think it advisable to observe that since the burden is upon the defendant to prove his allegations concerning discrimination, he must be given an opportunity to produce relevant, legal evidence, if he can, which tends to prove racial discrimination. *Millhouse v. State*, 232 Ala. 567, 168 So. 665; *State v. Perry*, 248 N.C. 334, 103 S.E.2d 404. . . .

Opinion extended and application for rehearing overruled.

All the Justices concur.

TRIAL PROCEDURE

Juries—Arkansas

H. O. WILLIAMS v. STATE of Arkansas.

Supreme Court of Arkansas, January 26, 1959, 322 S.W.2d 86.

SUMMARY: A Negro man, accused of involuntary manslaughter, moved the Jackson County, Arkansas, Circuit Court to quash the jury panel on the ground that there had been systematic exclusion of Negroes from jury panels in the county and that there were none on the panel in his case, the tendered proof showing that only five Negroes had served on panels in the county since 1956. In overruling the motion, the court emphasized that in every case since it was given the responsibility in 1952 of selecting jury commissioners, such persons had been instructed not to discriminate racially in the selection of jury panel members but to consider carefully all of the county's population and that it would be proper to include Negroes in their opinion qualified by character and judgment, with the result that Negroes had been "frequently" named on jury panel lists and had served as petit jurors. The defendant was convicted and appealed, alleging as error, *inter alia*, the trial court's ruling on the motion. The Arkansas Supreme Court affirmed, holding that the evidence proffered fell "far short" of showing purposeful or systematic exclusion of Negroes from jury service.

ROBINSON, Justice.

Appellant, H. O. Williams, a school teacher, was convicted of the crime of involuntary manslaughter and sentenced to two years in the penitentiary and fined \$1,000. On appeal appellant contends, among other things, that the evidence is not sufficient to support the verdict.

[Facts Related]

On the 25th day of February, 1957, Williams attempted to drive an old truck in a bad state of repair, to a shop at Weldon, in Jackson County, Arkansas, to have it repaired. He could not get the vehicle started, and it was therefore necessary to get assistance by having the truck pushed. Before he reached the hard surfaced road he got stuck in a mud hole. He left the truck there overnight; went back the next day and got Mr. Carr, who lived nearby, to pull him out of the mud hole with a tractor. Finally Williams arrived at the hard surfaced road with the truck and started north toward Weldon, about two miles distant. After traveling about one-half mile the truck began to sputter and stopped. The hard surfaced part of the road is 23 feet wide, and the truck came to a stop in the middle of the east travel lane. This was about 7:00 p. m. It was dark and drizzling rain. Williams had no flares. There was no tail light on the truck, and although one headlight had been burning when the truck was running, no light on the truck would burn after it stopped. Accepting Wil-

liams' testimony as true, he attempted to push the truck off the paved portion of the highway but was unable to do so. He attempted, also, to get other travelers on the highway to stop and help him, but none would stop. He then started walking toward Weldon with the intention of getting a garageman to come and move the truck. He had gone only a short distance when Mr. Burton, with whom he was acquainted, stopped and picked him up. At that time Burton cautioned Williams that the truck had been left in a dangerous place. Williams rode to Weldon with Mr. Burton and proceeded to the garage to get Euil Malden to go move the truck. Malden was eating his supper at the time, and he told Williams that he would have to finish his supper and finish the work he had been doing on a tractor before he could go after the truck. Williams was under the impression that this would not be too long. He sat down and waited for Malden until work was finished on the tractor. This work was not completed until about nine o'clock.

In the meantime, Mr. Jimmy Ray Simmons was driving his car north on the same road where the truck had been left; he was going in the same direction the Williams truck was headed when it stopped. In the car with Mr. Simmons were his wife and son, and Mr. Jim Benning and his wife and son, and Mrs. Benning's daughter, Linda, nine years of age. As Mr. Simmons approached the Williams truck, but before he got to a point where he could see it, he was met by a truck driven by Clyde Hen-

derson, traveling south. The lights from the Henderson truck blinded Simmons to the extent that he did not see the Williams truck until just a few feet from it. In an attempt to miss the Williams truck, he swerved to his left in such a manner that he struck the end of the rear bumper of the Henderson truck, which was passing at that moment, but he was unable to avoid striking the left rear of the Williams truck, which had a grain bed on it. As a result of the collision, Mrs. Benning and her daughter, Linda, received injuries from which they died two days later. The prosecuting attorney filed a felony information against Williams, charging him with manslaughter.

[Evidence Held Sufficient]

The point that has caused us considerable concern is whether the evidence is sufficient to sustain the conviction. After careful deliberation we have reached the conclusion that the evidence is sufficient. The facts are pretty well outlined above. On a dark and misty night the appellant left a heavy, two-ton, unlighted truck, equipped with a wide grain bed, in the middle of one of the travel lanes of a good hard surfaced road. He set out no flares, and had left the truck unguarded for about an hour and a half, when the tragedy occurred. Although, even if it is considered that it was necessary that he leave the truck on the highway unguarded in the first instance, it was a question for the jury as to whether Williams should have returned to the truck as soon as possible to help guard against the very thing that did happen. When he found out that Mr. Malden could not go after the truck immediately, he could have started walking and reached the truck a long time before the collision occurred. And if he had been with the truck when the cars approached at the same time from opposite directions, it is not beyond the range of possibility that he could have given signals that would have saved two lives. He knew the truck was in a dangerous place; he knew that the night was dark and that weather conditions caused poor visibility; and yet, for one and one-half hours, he did nothing to remedy the extremely dangerous situation he had brought about. Ark.Stats. § 41-2209 provides: "Involuntary manslaughter defined.—If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and

circumspection, it shall be manslaughter. Provided further than when the death of any person ensues within one [1] year as a proximate result of injury received by the driving of any vehicle in reckless, willful or wanton disregard of the safety of others, the person so operating such vehicle shall be deemed guilty of involuntary manslaughter." The defendant was charged in the words of the statute.

Appellant contends that the second part of § 41-2209 covers the offense of involuntary manslaughter resulting from the driving of an automobile exclusively; that the first part has no application when the death grows out of driving an automobile; and that the court erred in instructing the jury on doing a lawful act without due caution and circumspection. It is not necessary, however, to discuss this point, because an exception was not saved to the instruction as given. As far back as the year 1915, in the case of *Madding v. State*, 118 Ark. 506, 177 S.W. 410, 413, the court held that the first part of the statute, which was the only part in effect at that time, applied to the driving of an automobile "with reckless abandon and wanton disregard of the rights of others upon the street and without care as to their safety."

[Instruction Request Covered]

Appellant requested instructions dealing with efficient and immediate cause of the accident, and proximate cause. We think these instructions were covered by other instructions given by the court.

The defendant requested, also, instructions on "misfortune or accident." There is no evidence in the record to justify any instruction along that line.

Appellant also complains of the court's refusal to excuse for cause the venireman Breckenridge. On examination by counsel for the defendant Mr. Breckenridge stated that he had an opinion about the case that would take evidence to remove. But on further examination, he stated that he could and would go into the jury box with his mind completely open and try the case solely on the law and the evidence.

The appellant is a Negro.

[Motion To Quash Panel]

On December 9th, two days before the trial began, he filed a motion to quash the jury panel on the ground that there has been systematic ex-

clusion of Negroes from jury panels in Jackson County and that there was no Negro on the present jury panel. Two days later when the case was called to trial, no action had been taken on the motion. Counsel for defendant orally renewed the motion; It was overruled and exceptions were saved. The court stated: "Since January 1, 1952 the matter of selecting jury commissioners and instructing such commissioners has been the responsibility of this court. In every case, when jury commissioners were called upon to serve by the court, they have been instructed specifically and in considerable detail to the effect that there should be no discrimination on their part in the selection of members of jury panels because of race, color, creed or sex. Of course, no suggestion has ever been made as to whom should be placed on jury panels, but particular care has been used by the court to instruct these commissioners that they should place on such lists the names of people who were qualified electors and who, in their judgment, were people of good character and possessing such qualifications that in their considered opinions would make good jurors. Embodied in these instructions has been an explanation of the fact that a part of their duty was to carefully consider all of the population of Jackson County and if, in their opinions, there were members of the Negro race who possessed the necessary good character and judgment to qualify them for jury service that it would certainly be proper for them to include them on these lists. During these years it has been the court's personal observation, and the court takes judicial notice of the fact that frequently names of members of the Negro race have appeared on the jury panel lists, and not only that, but they have qualified and have served as petit jurors during this period of time." Counsel for the defendant then stated: "We are tendering the proof that there is no Negro on this panel, or these panels; there was one Negro, Willie Booker, on the February 1957 panel; there were two Negroes, O. A. Porter and John Laird, on the September 1956 panel; and there were two Negroes, Mack Newton and one other person, on the February 1956 panel."

Purposeful and systematic exclusion of the members of any race from jury service is contrary to law, but, as we said in *Dorsey v. State*, 219 Ark. 101, 240 S.W.2d 30, 36, "The burden of showing facts which permit an inference of purposeful limitation is on the defendant. Martin

v. State of Texas, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497." In the case at bar the proffered testimony falls far short of showing that there was purposeful or systematic exclusion of Negroes from jury service.

[Picture of Collision Scene]

The State introduced as evidence pictures of the scene of the collision. In one of these pictures there is a State policeman's automobile. We do not see how the automobile in the picture could in any way be prejudicial to the defendant. The width of the road and the width of the shoulders of the road were shown by other uncontroverted evidence. We do not think there was an abuse of discretion by the trial court in admitting the picture in evidence. *Southern National Ins. Co. v. Williams*, 224 Ark. 938, 277 S.W.2d 487.

[Physician's Testimony]

Dr. T. E. Williams, who treated Mrs. Benning and her daughter for the fatal injuries they received in the collision, over objections and exceptions of defendant, was allowed to state the nature of the injuries which resulted in their deaths. The prosecution made no effort to emphasize or dwell on the nature of the injuries for the purpose of arousing emotions of the jury. The doctor's testimony as abstracted by the appellant is as follows: "Mabel Benning was very severely injured and was in deep shock; she had a compound fracture of the right elbow and of the right ankle; she had a cerebral contusion, cerebral concussions, multiple bruises and lacerations scattered around her body; Linda Schol was in extreme shock, she had cerebral contusions, a comminuted fracture of the forearm, multiple abrasions, lacerations and bruises around her body; Mabel Benning was given the usual shock treatment of glucose and an attempt was made to reduce the fracture as much as possible to help relieve the shock; she was given narcotics for pain and an attempt was made to get her out of shock (Tr. p. 114); she died February 28th at 5:20 p. m. from brain damage; Linda Schol died February 28th at 10:45 p. m. from shock plus brain damage."

[Corpus Delicti]

Of course, it was incumbent upon the State to prove the corpus delicti. Failure to prove the cause of death could be fatal to the State's

case. *Cole v. State*, 59 Ark. 50, 26 S.W. 377. And, although the State may have had the right to rely on the defendant's admission in open court that the deaths were the result of the collision, the State was not required to rely on such admission to establish the *corpus delicti*.

Other points are argued, all of which we have examined carefully, but we find nothing calling for a reversal.

Affirmed.

Johnson, J., not participating.

Dissent

HARRIS, Chief Justice (dissenting).

I am of the opinion, that because of two errors (in my view) committed during the trial, this case should be reversed and remanded.

Dr. T. E. Williams was called as a witness for the State, and testified relative to the numerous injuries received by Mrs. Benning and Linda Schol. According to his evidence, the injuries to both were very severe, and those received by Mrs. Benning covered most of the body. He mentioned that the bone was protruding through the skin of her elbow, and also her right ankle. Appellant's counsel had previously in Chambers, made the following admission and objection:

"We concede that Mrs. Benning and the child, Linda Schol, died as a result of the collision within the statutory period. I believe a year is the statutory period, so we admit that fact.

"We feel that they should not pursue at any length in regard to the gravity of the injuries. We feel, Your Honor, that the State, since we have admitted the death of Mrs. Benning and the death of Linda Schol as a result of this collision, should not be permitted to introduce evidence by Dr. Williams, or anyone else, bearing solely

upon the aggravated nature of the injuries, which could only serve to inflame the passions, and not to enlighten the jury as to any fact."

Also, at the conclusion of Dr. Williams' testimony, counsel again renewed the objection, and requested the court to exclude this evidence and to instruct the jury to disregard all of the doctor's testimony except that which showed the deaths of the persons involved. The court again overruled the objection and appellant's exceptions were noted. The injuries were of an extensive nature, and it is my feeling that this testimony could have influenced the jury in its verdict. The evidence was certainly unnecessary as the prosecution was based solely upon the death of Mrs. Benning and Linda Schol, which fact counsel admitted.

I also feel that the admission of State's Exhibit No. 7, a posed photograph, showing a State Police car parked on the side of the highway, was prejudicial error. The evidence pretty well reflected that the footage between the pavement and a ditch on the right hand side (facing north), was insufficient to be properly termed a shoulder. The photograph, however, shows the car as resting between the edge of the pavement and this ditch. The State admitted that the two-ton truck owned by appellant, involved in the collision, was wider than the automobile, but stated that the picture was only offered as an aid to the jury in visualizing the width of the side of the highway. I cannot see that it was admissible for any purpose. Evidence had already been offered as to the width between the edge of the pavement and the ditch (7 feet, 1 inch) and it is quite obvious to me that the truck, carrying a large wide bed, could not possibly have parked completely off the highway. Yet, this picture, when viewed by the jury, could have well served as a suggestion that if the trooper could park his car in that space, appellant could have done likewise.

For these reasons, I respectfully dissent to the holding of the majority.

TRIAL PROCEDURE

Juries—Federal Courts

Rufus FRASIER v. UNITED STATES of America.

United States Court of Appeals, First Circuit, May 22, 1959, 267 F.2d 62.

SUMMARY: A Negro man was convicted in a federal district court in Massachusetts on an indictment charging him with knowingly and wilfully making false statements to the Department of the Army of the United States, in his "Loyalty Certificate for Personnel of the Armed Forces," that he had not been a member of the Communist Party and that he had not attended formal or informal meetings or gatherings of the Communist Party. At the trial, the district judge refused a request by defendant's counsel to examine prospective jurors as to whether they would be prejudiced against defendant because of his race. On appeal, the Court of Appeals for the First Circuit held such refusal error, despite arguments that the case did not involve a crime of violence likely to arouse racial prejudice, and vacated the judgment, set aside the verdict, and remanded the case. Excerpts from the opinion dealing with the racial issue follow.

Before MAGRUDER, Chief Judge, and WOODBURY and HARTIGAN, Circuit Judges.

HARTIGAN, Circuit Judge.

This is an appeal by the defendant, Rufus Frasier, from a judgment of conviction of the United States District Court for the District of Massachusetts entered on July 22, 1958. The judgment was based on a jury verdict finding the defendant guilty on two counts of an indictment charging violations of 18 U.S.C. § 1001 (1952).¹ The first count charged that the defendant knowingly and wilfully on or about August 6, 1952 executed and presented a false statement to the Department of the Army of the United States when he represented that he had not been a member of the Communist Party, U.S.A. The second count charged the defendant with a similar false statement in his denial of having attended formal or informal meetings or gatherings of the Communist Party, U.S.A.

• • •

[Error Committed]

The defendant's fifth point concerns the district judge's unequivocal refusal, following a

request by the defendant's trial counsel, to examine the prospective jurors as to whether they would have any bias or prejudice against the defendant because he was a negro. Although we are mindful of the wide discretion given the district court in the examination of jurors under Fed.R.Crim. P. 24(a), 18 U.S.C., and have considered the Government's arguments that this case does not involve a crime of violence such as is likely to arouse racial prejudice, we are bound by the broad rule set forth in *Aldridge v. United States*, 1931, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054. See *United States v. Dennis*, 2 Cir., 1950, 183 F.2d 201, 228, affirmed 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. We, therefore, hold that the district court committed error in refusing to inquire as to the existence of any bias or prejudice on the part of the jurors because the defendant was a negro which would preclude them from rendering a fair verdict.²

fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

1. "§ 1001. Statements or entries generally.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false,

2. It is to be noted that no question inquiring as to the existence of any general bias or prejudice was asked on the *voir dire* by the district judge. On the contrary, the only inquiry concerning prejudice was relative to the nature of the charge and the fact that it involved the Army of the United States. There was no inquiry broad enough to include any bias or prejudice that might have existed because the defendant was a member of the colored race. Cf. *Commonwealth v. Lee*, 1949, 324 Mass. 714, 88 N.E.2d 713.

TRIAL PROCEDURE

Juries, Venue—Louisiana

STATE of Louisiana v. Andrew J. SCOTT.

Supreme Court of Louisiana, March 23, 1959, 110 So.2d 530.

SUMMARY: A Negro resident of Baton Rouge, Louisiana, was indicted, convicted, and sentenced to death for an aggravated rape upon a white woman, resident of a rural area of Livingston Parish. There was one Negro on the grand jury panel but no Negroes on the petit jury panel. On appeal, it was alleged that the trial court erred in overruling motions to quash both (1) the indictment and (2) the general venire, on the ground that Negroes had been systematically excluded in the selection of the general venire, and (3) a motion for a change of venue because it would be impossible in a case of great local notoriety to secure an unbiased jury. The Louisiana Supreme Court affirmed, holding that (1) under the Louisiana Code objections to a venire because of an alleged denial of equal protection of the law cannot be raised on a motion to quash an indictment, which addresses itself only to the legal sufficiency of the pleading on its face, (2) defendant had failed to show a past practice of including only a token number of Negroes on the venire, as against testimony that all jurors are selected without racial discrimination from the parish registration roll of some 5000 persons, including 405 Negroes, and (3) the appeal record failed to reveal that the trial judge had abused his discretion in denying a change of venue motion where most of defendant's witnesses on this motion, as well as many prominent local citizens called by the prosecution, testified that a fair trial in the parish could be held.

McCALEB, Justice.

On October 19, 1957, at about 2:00 p.m., appellant, a 20 year old Negro, accosted Mrs. Larecy Blount Graham, a white woman, at her residence located in a rural area of Livingston Parish. At the time he made his presence known, appellant was wearing a cloth mask and, when Mrs. Graham screamed, he struck her and her two children, aged seven and four, who were on the scene. After threatening Mrs. Graham and her children with an iron chisel he dragged her into a bedroom, where he raped her. Later in the day, appellant was apprehended for the crime and, on December 6, 1957, he was indicted for aggravated rape. A trial resulted in a verdict of guilty and, following the pronouncement of a death sentence, this appeal was prosecuted, in which appellant is relying on 11 bills of exceptions for a reversal of his conviction.

* * *

[Venue Change Requested]

Bill of Exceptions No. 3 was reserved to the overruling of appellant's motion for a change of venue, which was based mainly on the grounds that appellant was a young Negro, a resident of Baton Rouge, who was without friends or acquaintances in Livingston Parish, charged

with the aggravated rape of a well-known white woman of that Parish, who had many friends and relatives therein, some of whom had already been drawn on the general venire, and that, due to the notoriety of the case through newspaper reports and word of mouth, there was so much prejudice created against him throughout the Parish, particularly because of his race, it would be impossible to secure an unbiased and unprejudicial jury which would give him a fair and impartial trial.

In his per curiam to this bill of exceptions, the judge asserts that appellant failed to prove that he could not get a fair trial in Livingston Parish; that most of the witnesses summoned by him testified to the contrary and that, in addition thereto, many prominent citizens of the parish called by the prosecution stated without equivocation that there had been no widespread antagonism against Negroes generally, no mob demonstrations against appellant and that they knew of no reason why he could not obtain a fair trial in the Parish.

[Burden of Proof]

The burden of establishing that an applicant cannot obtain a fair trial in the parish where the crime was committed rests with him. The test is whether there can be secured with reasonable

certainty from the citizens of the parish a jury whose members will be able to try the case on the law and evidence, uninfluenced by what they may have heard of the matter and who will give the accused full benefit of any reasonable doubt arising either from the evidence or the lack of it. *State v. Rini*, 153 La. 57, 95 So. 400 and *State v. Faciane*, 233 La. 1028, 99 So.2d 333 and authorities there cited. The power to grant a change of venue rests in the sound discretion of the trial judge, whose ruling will not be disturbed in the absence of a showing of clear abuse thereof. *State v. Johnson*, 226 La. 30, 74 So.2d 402; *State v. Swails*, 226 La. 441, 76 So.2d 523 and *State v. Faciane*, supra. A review of the evidence on the motion for change of venue reveals that the judge did not abuse his discretion in denying the motion.

In connection with the motion for change of venue, we note that appellant attempted to show that there was a systematic exclusion of Negroes from jury service in the Parish of Livingston. This matter will be considered under appellant's Bill No. 4 which was taken to the overruling of a motion to quash the venire on this ground for, if the motion to quash is well founded, there would be no point in discussing whether the venue should be changed.

[Systematic Exclusion]

We pass on, then, to a consideration of Bill No. 4, which, as aforesaid, was taken to the overruling of the motion to quash the general venire on the ground that there has been a systematic exclusion of Negroes from jury service in Livingston Parish. The testimony of the jury commissioners is to the effect that the registration roll of the parish is generally used in selecting persons for jury duty, there being 405 Negroes out of a total registration of approximately 5,000 persons and that there has never been any attempt to exclude Negroes because of their race. There was one Negro on the grand jury panel which indicted appellant but no Negroes on the petit jury panel. There is no showing whatever by appellant that there was a practice in the past of including a token number of Negroes on the venire and, indeed, nothing from which the conclusion could be drawn of a planned exclusion, the testimony being that all jurors are selected for service without any discrimination as to their race or color. The motion was, therefore, properly overruled. *Eubanks v. State of Louisiana*, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991; *State v. Fletcher*, 236 La. 40, 106 So.2d 709 and *State v. Coleman*, 236 La. 629, 108 So.2d 534.

* * *

The conviction and sentence are affirmed.

TRIAL PROCEDURE

Petit Juries—Maryland

Johnnie BROWN v. STATE of Maryland.

Court of Appeals of Maryland, May 8, 1959, 150 A.2d 895.

SUMMARY: A Negro man was sentenced to death following a jury verdict of guilty of first degree murder for shooting to death a policeman who had lawfully arrested him for forgery. On appeal, it was contended that the trial court erred in the voir dire examination of the jurors in refusing to ask eight of fourteen questions submitted by defendant's counsel. The Maryland Court of Appeals, stating that the extent of the examination rests in the sound discretion of the trial court, which may frame its own questions and not permit cross examination by counsel, held that the trial court's discretion had not been abused in refusing to ask questions as to the jurors' reading or hearing accounts of the case or discussing it, since the jurors already had said that they had not formed or expressed any opinion as to

the guilt or innocence of defendant. It was also held that a question as to the connection of any juror with the attorneys of the case did not have to be asked. However, the judgment was reversed and the case remanded because of the trial court's refusal to ask questions as to the prejudice which jurors might have concerning a Negro and whether they could give the defendant as fair a trial as they could a white man, the appellate court characterizing such questions as falling into a "different category."

HAMMOND, Judge.

Johnnie Brown, a Negro, appeals from a judgment and sentence of death following a jury's verdict that he was guilty of murder in the first degree for shooting a policeman as he was being taken to the station house. It is contended that the trial court erred in refusing to examine the jurors on their *voir dire* as to possible prejudice against Negroes, that it was error to admit evidence tending to prove prior crimes, that the jury should have been instructed that there was no evidence as a matter of law of murder in the first degree, and, finally, that two questions asked appellant by the trial court were improper and prejudicial.

[Facts Related]

Johnnie Brown, who apparently had never before been in trouble with the law, uttered two checks he had forged on September 5, 1958, in Salisbury. The next day he attempted to utter another check he had forged. A description was furnished immediately by the storekeeper who had refused to cash the proffered check, and in the evening of that day an officer of the Salisbury police force arrested Brown. It was stipulated that the arrest and custody were lawful. The police officer did not handcuff appellant or put him under any form of physical restraint. The two walked together towards the police station several blocks away. To get to the station it was necessary to pass through a dark alley about ten feet wide. As the officer was preceding the appellant up the alley, he was shot by a bullet from appellant's pistol. The bullet entered his back at about the level of his third rib and came out the front of his neck. The officer staggered into police headquarters, where he died shortly thereafter, and the appellant ran out of the alley and down the street and was soon taken into custody by another policeman as he lay hiding in some bushes. No one saw the shooting and there was no testimony, except that of Brown, as to how it occurred.

Brown's story was that he wished to discard his pistol, which he had put in his pocket as he

was leaving his room that evening, because he suspected that he had been picked up for forgery and thought it wise to get rid of the pistol, and that he reached with his left hand into his right coat pocket in an attempt to ease the gun to the alley, and the shot followed by mistake or accident. Several witnesses saw the appellant running from the alley with the gun in his right hand. A ballistics expert testified that a bullet and shell, which were picked up by a patrolman in the alley at the place of the shooting, came from appellant's gun, that it took a five or six-pound pull on the trigger of the gun to discharge it, and that it could not have been discharged accidentally, by jolt or otherwise, only by pulling the trigger.

[Questions Submitted]

The case was moved to Dorchester County for trial, and counsel for appellant, who had been appointed by the court, submitted to the court a list of fourteen questions to be asked prospective jurors. The court asked six of the questions and refused to ask the other eight. Three of those not asked were whether the jurors had read or heard any accounts of the case in the newspapers or on the radio or television, and whether they had discussed the guilt or innocence of the accused. Another question not asked was whether the jurors were associated with or related to the attorneys in the case, either for the State or for the defense. The remaining unasked questions were directed towards ascertaining whether the jurors had any prejudice against a Negro which would prevent them from giving a Negro as fair and impartial a trial as they would a white man. Question ten, for example, was: "Can you, without bias or prejudice, pass your verdict in this case solely on the evidence produced from the witness stand without regard to the race, creed or color of the Defendant?"

As we reiterated in *McGee v. State*, 219 Md. 53, 58, 146 A.2d 194, 196: "It is settled in Maryland that in examination of jurors on their *voir dire*, the court may frame its own questions and

not permit cross-examination by counsel, that the extent of the examination rests in the sound discretion of the court, and that the purpose of the inquiry is to ascertain 'the existence of cause for disqualification and for no other purpose.' *Adams, Nelson, and Timanus v. State*, 200 Md. 133, 140, 88 A.2d 556, 559, and cases cited; *Bryant v. State*, 207 Md. 565, 115 A.2d 502." We see no abuse of discretion or prejudice to the accused in the refusal to ask the questions as to reading or hearing accounts of the case, or discussing it. All the jurors had already said that they had not formed or expressed any opinion as to the guilt or innocence of the accused, and the fact that a prospective juror has read or heard publicity concerning the accused or the crime does not of itself disqualify him or raise any presumption of prejudice. *Bryant v. State*, 207 Md. 565, 577-579, 115 A.2d 502; *Piracci v. State*, 207 Md. 449, 511-512, 115 A.2d 262; *Grammer v. State*, 203 Md. 200, 209, 100 A.2d 257.

The question as to the connection of any juror with the attorneys of the case did not have to be asked, as was held in *McGee v. State*, *Bryant v. State*, both *supra*; and *Emery to Use of Calvert Ins. Co. v. F. P. Asher, Jr., & Sons, Inc.*, 196 Md. 1, 6, 75 A.2d 333.

[Racial Bias Question Different]

The refusal to ask any questions as to the bias or prejudice which jurors might have as to a Negro, and to whether the jury could give the defendant as fair and impartial a trial as they could a white man, falls into a different category, requiring more consideration. Although some courts have found no error in refusal to question prospective jurors as to such prejudice, the majority, and we think the far better reasoned, of the cases, holds to the contrary. One of the more recent cases on the subject, which expresses well the views we hold, is *State v. Higgs*, 143 Conn. 138, 120 A.2d 152, 154, 5 A.L.R.2d 1199. There, on *voir dire* examination, the negro defendant was not permitted to ask questions designed to uncover prejudice against the Negro race to such an extent that it would take less evidence to convince that a Negro was guilty of the crime charged than to convince that a white person had committed a similar crime. The Supreme Court of Errors held that there was an abuse of discretion in excluding from the examination on the *voir dire* all questions as to race prejudice. The Court said:

"Clearly, therefore, if there is any likelihood that some prejudice is in the juror's mind which will even subconsciously affect his decision of the case, the party who may be adversely affected should be permitted questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. Otherwise, the right of trial by an impartial jury guaranteed to him * * * might well be impaired. * * *

"In line with this thought, it is almost uniformly held in other jurisdictions that it is reversible error in a criminal case in which a Negro is the defendant to exclude questions, propounded by him on the *voir dire*, designed to bring out that a prospective juror is so prejudiced against the Negro race that it would take less evidence to convince him that a Negro was guilty of the crime charged than to convince him that a white person had committed a similar crime. * * *

"We cannot be blind to the fact that there may still be some who are biased against the Negro race and would be more easily convinced of a Negro's guilt of the crime of rape than they would of a white man's guilt. * * *

"So long as race prejudice exists, even in a relatively few persons, there is a substantial chance that one of those few will appear in court as a venireman. Consequently, the fact that most people in the state are not prejudiced against Negroes is not of controlling importance."

[Supreme Court Case Cited]

The Supreme Court reached the same conclusion in *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 473, 75 L.Ed. 1054. There the Court said that the question was not as to the dominant sentiment of the community and the general absence of disqualifying prejudice, but as to the bias of the particular jurors who were to try the accused, and continued:

"If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit. * * * we do not think that it can be said

that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry. And this risk becomes most grave when the issue is of life or death."

See, also *Pinder v. State*, 27 Fla. 370, 8 So. 837; *Hill v. State*, 112 Miss. 260, 72 So. 1003; *State v. McAfee*, 64 N.C. 339; and annotations in 54 A.L.R.2d 1204. In *Lee v. State*, 164 Md. 550, 556, 165 A. 614, there was at least an implication that the accused would have been entitled to have asked the questions that the appellant here requested. See also *Casey v. Roman Catholic Archbishop*, 217 Md. 595, 605, 143 A.2d 627.

The court below asked no question whatever as to bias or prejudice, even in the broadest terms. Unless bias is inquired into beforehand, its existence ordinarily will not become known since the verdict cannot be impeached. We hold that the failure to elicit from the jurors the essence of the information sought by the appellant was reversible error.

* * *

Because of the prejudice to the appellant from the failure of the trial court to examine the jurors as to possible racial prejudice, the case is reversed and remanded for a new trial.

Judgment reversed and case remanded for a new trial.

TRIAL PROCEDURE

Petit Juries—New York

PEOPLE v. Thomas FRYE, William A. Wynn, Ralph Dawkins, Jackson Turner, Jr.

Court of Appeals of New York, October 16, 1958, 180 N.Y.S.2d 314.

SUMMARY: Convictions of four persons of first degree murder by a Queens County Court were affirmed by the New York Court of Appeals. In a memorandum decision, motion to amend the remittitur was granted by the latter court to show that one of the defendants had asserted that he was deprived of Fourteenth Amendment rights in that Negroes were excluded from the trial jury and in that he was not allowed access to counsel when questioned by the police on his arrest, and to show that the Court of Appeals had held that defendant's Fourteenth Amendment rights had not been violated. A motion by the same defendant for a stay of execution was dismissed upon the ground that the court lacked power to grant it.

TRIAL PROCEDURE

Sentencing—Florida

Ralph WILLIAMS v. STATE of Florida.

Supreme Court of Florida, March 25, 1959, 110 So.2d 654.

SUMMARY: A Negro was convicted of rape in a Florida state court and, there being no jury recommendation for mercy, was sentenced to death. Among other issues on appeal, he contended that statutes prescribing the death penalty for the crime of rape unless a majority of the jury recommend mercy, produce an unconstitutional denial of equal protection as ap-

plied by Florida juries, which had since 1925 prescribed the death penalty in rape cases for 33 Negroes but for only one white person. The contention was rejected by the Florida Supreme Court, which cited two of its recent decisions as controlling. [See also *State ex rel. Copeland v. Mayo*, 87 So.2d 501, 1 Race Rel. L. Rep. 903 (Fla. 1956) and *Thomas v. State*, 92 So.2d 621, 2 Race Rel. L. Rep. 657 (Fla. 1957)].

THORNAL, Justice.

Appellant Ralph Williams, who was defendant below, seeks reversal of a judgment of conviction and sentence to death in the electric chair pursuant to a jury verdict finding him guilty of the crime of rape. . . .

This appellant repeats a contention which has been examined by this court several times recently when he asserts the unconstitutionality of Sections 794.01 and 919.23, Florida Statutes, F.S.A., prescribing the penalty of death for the crime of rape unless a majority of the jury recommended mercy. He submits the view that since 1925, when the electric chair was authorized, juries in Florida have prescribed the death penalty for 33 Negroes in rape cases. He says that only one white man has been electrocuted for this crime during the same period. He doesn't point out the number who have been tried for the crime. Appellant's position simply is that, as applied by juries in this state, the statute pro-

duces a discrimination among those similarly conditioned and therefore a denial of equal protection of the law. We can add nothing to that which we have previously stated in *Thomas v. State*, Fla.1957, 92 So.2d 621, and *State ex rel. Copeland v. Mayo*, Fla. 1956, 87 So.2d 501. The contention as to the alleged unconstitutionality of the cited statutes is once again found to be without merit. . . .

We have thoroughly scrutinized the record and have carefully examined all of the evidence in accord with the requirements of Section 924.32, Florida Statutes, F.S.A., in order to determine whether the ends of justice require a new trial. Finding no error and finding as we do that the ends of justice do not demand a new trial, the judgment under attack is affirmed.

Affirmed.

TERRELL, C. J. and THOMAS, DREW and O'CONNELL, JJ., concur.

LEGISLATURES

EDUCATION

Public Schools—Arkansas

Act 208 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 25, 1959, provides that the "average daily attendance" of a school closed by proclamation of the Governor shall be that of the year preceding such closing.

AN ACT to Define "Average Daily Attendance" for the Purposes of Act 245 Ark. Acts of 1957 in the Case of Schools Closed in Accordance With Act 4, Ark. Acts of 1958.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. For the purposes of Act 245, Ark. Acts of 1957 the "average daily attendance" of any school closed by proclamation of the Governor in accordance with the provisions of Act 4, Ark. Acts of 1958, Second Extraordinary Session, shall be that of the year immediately preceding such closing.

EDUCATION

Public Schools—Arkansas

Act 461 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 30, 1959, establishes criteria for the assignment and placement of pupils in public schools, and grants school boards a quasi-judicial function with respect to hearings on such assignments.

AN ACT to Control the Assignment and Placement of Pupils in the Public Schools; to Establish and Regulate the Procedure for Hearings by Local School Boards With Respect to the Operation of Public Schools; to Authorize the Attorney General to Render Advice and Assistance to Local School Boards; to Provide That School Boards Shall Exercise a Quasi-Judicial Function With Respect to Hearings Upon the Assignment of Pupils; to Limit the Liability of School Boards, the Members Thereof, Officials and Employees in the Exercise of Their Official Duties as Herein Set Forth."

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. The legislature finds and declares that the rapidly increasing demands upon the public economy for the continuance of education as a public function and the efficient maintenance and public support of the public school system require, among other things, consideration of a more flexible and selective procedure for the establishment of units, facilities and curricula and as to the qualification and assignment of pupils.

The legislature also recognizes the necessity

for a procedure for the analysis of the qualifications, motivations, aptitudes and characteristics of the individual pupils for the purpose of placement, both as a function of efficiency in the educational process and to assure the maintenance of order and good will indispensable to the willingness of the citizens and taxpayers of the State of Arkansas to continue a public educational system as a necessary public function, and also a vital part of the sovereignty and police power of the State of Arkansas.

Section 2. To the ends aforesaid, the State Board of Education shall make continuing studies as a basis for general reconsideration of the efficiency of the educational system in promoting the progress of pupils in accordance with their capacity and to adapt the curriculum to such capacity and otherwise conform the system of public education to social order and good will. Pending further studies and recommendations by the school authorities the legislature considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with request on behalf of the pupil would be disruptive to orderly administration, tend to invite or induce disorganization and impose an excessive burden on the available resources and teaching and administrative personnel of the schools.

Section 3. Pending further studies and legislation to further effectuate the policy declared by this Act, the respective school districts and county Boards of Education, hereinafter referred to as "local Boards of Education," are not required to make any general reallocation of pupils already entered in the public school system and shall have no authority to make or administer any general or blanket order to take effect from any source whatever, or to give effect to any order which shall purport to or in effect require transfer or initial or subsequent placement of any individual or group in any unit or facility without a finding by the local Board that such transfer or placement is as to each individual pupil consistent with the test of the public and educational policy governing the admission and placement of pupils in the public school system prescribed by this Act.

Section 4. Subject to appeal in the limited respect herein provided, each local Board of Education shall have full and final authority and

responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those functions. Subject to review by the local Board of Education as provided herein, the local Board of Education may exercise this responsibility directly or may delegate its authority to the Superintendent. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

Section 5. A local Board of Education may, by mutual agreement, provide for the admission to any school of pupils residing in adjoining districts whether in the same or different counties, and for transfer of school funds or other payments by one Board to another for or on account of such attendance.

Section 6. Local Boards of Education shall have authority to assign and re-assign or transfer all teachers in schools within their jurisdiction.

Section 7. A parent or guardian of a pupil may file in writing with the local Board objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, the Board shall act upon the same within 30 days, stating its conclusion. If a hearing is requested the same shall be held beginning within 30 days from receipt by the Board of the objection or petition at a time and place within the school district designated by the Board.

The Board may itself conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be final on behalf of the Board. The Board of Education is authorized to designate one or more of its members or one or more competent examiners to conduct any such hearings and to take testimony, and to make a report of the hearings to the entire board for its determination. No final order shall be entered in such case until each member of the board of education has personally considered the entire records.

In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations for examinations.

For the purpose of conducting hearings or investigations hereunder, the local Board shall through its President, or Secretary, have the power to administer oaths and affirmations. It shall be the duty of each local Board to hear and consider all witnesses appearing before the said Board and having information pertinent and relative to the matter and to consider all relevant documentary evidence. Witnesses at such hearings conducted under this Act before a local Board, shall not be entitled to any witness fee.

Section 8. Any other provisions of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled with a written objection of the parent or guardian has been filed with the Board of Education. If in connection therewith a requested

assignment or transfer is refused by the Board, the parent or guardian may notify the Board in writing that he is unwilling for the pupil to remain in the school to which assigned, and the assignment and further attendance of the pupil shall thereupon terminate; and such child shall be entitled to such aid for education as may be authorized by law.

Section 9. The findings of fact and the action of the Board shall be final and such findings and action shall be made a part of the records of the local Board; however, if any pupil or the parent or guardian, if any, of any minor, or, if none, if the custodian of any such minor shall, as next friend, file an exception before such Board to the final action of the Board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States or of any right under the Laws of Arkansas, and the Board shall not, within 15 days, reconsider its final action, an appeal may be taken from the final action of the local Board, on such ground alone, to the *Circuit Court of the Judicial Circuit*, and in which the school board is located, by filing with the Clerk of the *Circuit Court* within thirty (30) days from the date of the local Board's final decision a petition stating the facts relevant to such pupil as bearing on the alleged denial of his rights under the United States Constitution or the Constitution and/or laws of the State of Arkansas, accompanied by a surety bond approved by the said Clerk, conditioned to pay all costs of appeal if the same be not sustained. A copy of such petition and bond shall be filed with the President or the Secretary of the local Board from whose order, the petitioner is appealing. The filing of such petition of appeal shall not suspend or supercede an order of the local Board of Education; nor shall the Court have the power or jurisdiction to suspend or supercede the said order of the local Board issued under this Act before the entry of the final decree in the proceedings, except that the Court may suspend such an order upon application by the petitioner made at the time of the filing of the petition for appeal, and after a preliminary hearing, and upon a prima facie showing by the petitioner that the local Board has acted unlawfully to the manifest detriment of the child who is the subject of the proceeding.

On Such appeal the *Circuit Court* will try the said cause de novo, but the determination made by the local Board shall remain in full force

and effect until superceded by a lawful decree or order of the *Circuit Court* as set out herein. An appeal may be taken to the Supreme Court of Arkansas from the decisions of the *Circuit Court* in the same manner as appeals may be taken in other suits *at law*, either by the petitioner or by the local Board of Education.

Section 10. The local Board before whom any objection or proceeding with respect to the placement of pupils is pending, may, upon authorization in writing of a majority of the elected members of the local Board, request the Attorney General of the State of Arkansas, to appear in such proceedings as *amicus curiae* to assist the local Board in the performance of its quasi judicial functions and to represent the public interest. Expenses of any reporters or any cost of such proceedings approved by the local Board, shall be the obligation of the district or county board involved and shall be paid from the public school funds of such district or county.

Section 11. Since the determination of the matters required to be considered by the local Boards pursuant to the provisions are of a quasi judicial nature the members of such local boards are clothed with the immunities of all other tribunals of a similar nature; the President and Secretary of each local board shall have the

authority to administer oaths for the purpose of taking the testimony of witnesses appearing before the Board; such oath when administered, shall have the same effect as if administered by the foreman of a grand jury.

Section 12. No Board of Education or any member thereof, nor any district or county employee or the superintendent thereof, or any teacher shall be answerable to any charge of libel, slander or other action, whether civil or criminal, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statements made in the course of proceedings or deliberations provided for under this Act.

Section 13. If any section, clause, sentence, paragraph, part or provision of this Act shall be found to be invalid or ineffective by any Court, it shall be conclusively presumed that this Act would have been passed by the General Assembly without such invalid section, clause, sentence, paragraph, part or provision and the Act as a whole shall not be declared invalid by reason of the fact that some part thereof may be found invalid by such Court.

Section 14. All laws and parts of laws in conflict herewith are hereby repealed.

EDUCATION

Public Schools—Florida

Chapter 59-138 (House Bill.No. 52) of the 1959 Florida Legislature, approved by the Governor May 26, 1959, adds to the existing statutory powers and duties of county school boards the discretionary power "to separate the sexes in the various schools of the county." The statute as amended appears below, with new language in italics.

AN ACT relating to the county school system; amending paragraph (b) subsection (6) of Section 230.23, Florida Statutes, by providing discretionary power in the county school boards to separate the sexes; providing an effective date.

Be It enacted by the Legislature of the State of Florida:

Section 1. Paragraph (b) of subsection (6)

of section 230.23, Florida Statutes, is amended to read:

230.23 Powers and duties of county board.—The county board acting as a board shall exercise all powers and perform all duties listed below:

(6) **CHILD WELFARE.**—Provide for the proper accounting for all children of school age, for the attendance and control of pupils at school, for proper attention to health, safety,

and other matters relating to the welfare of children in the following fields, as prescribed in chapter 232.

(b) Admission, classification, promotion, and graduation of pupils.—Adopt rules and regulations for admitting, classifying, promoting, and graduating pupils to or from the various schools

of the county, *including discretionary power to separate the sexes in the various schools of the county.*

Section 2. This act shall become effective immediately.

Approved by the Governor May 28, 1959.

EDUCATION

Public Schools—Florida

Chapter 59-428 (Committee Substitute for House Bill No. 248) of the 1959 Florida Legislature, approved by the Governor June 19, 1959, amends the Florida Pupil Assignment Law [1 Race Rel. L. Rep. 237 (1955), 1 Race Rel. L. Rep. 924 (1956)] to provide as additional factors to be taken into consideration in designating the school to which pupils may be assigned: (1) the request or consent of the pupil's parent or guardian; (2) the effect the admission of new pupils will have on the academic progress of other pupils enrolled in a particular school; and (3) the adequacy of a pupil's academic preparation for admission to a particular school. The Act also adds a severability clause. The amended subsection and the new subsection appear below, with new language in italics and a deleted word in brackets.

AN ACT to amend Subsection (2) of Section 230.232, Florida Statutes, with respect to the assignment of pupils in the public schools; adding Subsection (7) of Section 230.232, Florida Statutes, to provide a severability clause.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 230. 232, Florida statutes, is amended to read:

230.232 Pupil assignment; powers and duties of county boards of public instruction.—

(2) In the exercise of [the] authority conferred by subsection (1) upon the county boards of public instruction, each such board shall provide for the enrollment of pupils in the respective public schools located within such county so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, education and general welfare of such pupils. In the exercise of such authority the board shall prescribe school attendance areas and school bus transportation

routes and may adopt such reasonable rules and regulations as in the opinion of the board shall best accomplish such purposes. The county boards of public instruction shall prescribe appropriate rules and regulations to implement the provisions of this subsection and other applicable laws of this state and to that end may use all means legitimate, necessary and proper to promote the health, safety, good order, education and welfare of the public schools and the pupils enrolling therein or seeking to enroll therein. In the accomplishment of these objectives the rules and regulations to be prescribed by the board may include, but be not limited to, provisions for the conduct of such uniform tests as may be deemed necessary or advisable in classifying the pupils according to intellectual ability and scholastic proficiency to the end that there will be established in each school within the county an environment of equality among pupils of like qualifications and academic attainments. In the preparation and conduct of such tests and in classifying the pupils for assignment to the schools which they will attend, the board shall take into account

such sociological, psychological and like intangible social scientific factors as will prevent, as nearly as practicable, any condition of socio-economic class consciousness among the pupils attending any given school in order that each pupil may be afforded an opportunity for a normal adjustment to his environment and receive the highest standard of instruction within his ability to understand and assimilate. In designating the school to which pupils may be assigned there shall be taken into consideration *the request or consent of the parent or guardian or the person standing in loco parentis to the pupil*, the available facilities and teaching capacity of the several schools within the county, the effect of the admission of new students upon established academic programs, *the effect of admission of new pupils on the academic progress of the other pupils enrolled in a particular school*, the suitability of established curriculum to the students enrolled or to be enrolled in a given school, *the adequacy of a pupil's academic preparation for admission to a particular school*, the scholastic aptitude, intelligence, mental energy or ability of the

pupil applying for admission and the psychological, moral, ethical and cultural background and qualifications of the pupil applying for admission as compared with other pupils previously assigned to the school in which admission is sought. It is the intention of the legislature to hereby delegate to the local school boards all necessary and proper administration authority to prescribe such rules and regulations and to make such decisions and determinations as may be requisite for such purposes.

Section 2. Chapter 230, Florida Statutes, is amended by adding subsection (7) of Section 230.232 to read:

230.232 Pupil assignment; powers and duties of county boards of public instruction.—

(7) The provisions of this act are severable, and if any section or provision of this act shall be held to be in violation of the Constitution of Florida or of the United States, such decision shall not affect the validity or enforceability of the remainder of this act.

Approved by the Governor June 19, 1959.

EDUCATION

Public School Funds—Arkansas

Act 275 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 25, 1959, authorizes school districts to transfer funds to other districts which provide educational opportunities for students from the transferring district.

AN ACT to Permit Local School Districts to Transfer From Local Tax Revenue and/or Non-Revenue Receipts Monies to Another School District Which Is Providing Educational Opportunities for Pupils From the District in Which the Pupils Live; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Local school districts of this State are hereby authorized to enter into a con-

tract for one or more years with another local school district which contract states the amount of money to be spent by one district and credited to the servicing district as a means of reimbursing the servicing district for their pupils who do not live within the boundaries of the servicing district. Such funds may be from revenue and/or non-revenue receipts, may be borrowed or the local school district may propose a millage for this purpose, and may be used for facilities, services, supplies and equipment by the servicing district.

Section 2. The State Board of Education shall approve such contracts before transfer of funds may be made.

Section 3. All laws and parts of laws in conflict herewith are hereby repealed.

Section 4. It is hereby found and determined by the General Assembly that a number of school districts are in need of pooling facilities and resources in order to provide adequate edu-

cational opportunities to school children of such districts; that the present laws of this State do not authorize such cooperative action on the part of school districts; and, that only by the immediate passage of this Act may such situation be corrected. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

EDUCATION

Public School Funds—Arkansas

Act 466 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 31, 1959, provides for the return to school districts of surplus withheld funds, when such funds have been withheld under Act 5, Arkansas Acts of 1958 (Extra Session) because of the closing of a school due to desegregation. (3 Race Rel. L. Rep. 1043).

AN ACT to Amend Act 5, Ark. Acts of 1958 (Ex. Sess.) Section 3, to Provide for a Return to School Districts of Surplus Withheld Funds.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Act 5, Ark. Acts of 1958 (Ex. Sess.) Section 3 is amended to read as follows:

"Section 3. Should any of the students of any school so closed by order of the Governor determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Educa-

tion to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds contained in Act 305, approved March 27, 1957, shall be usable for the purposes herein provided. At the end of the school year all funds withheld as aforesaid which have not been paid over to a public school or non-profit private school accredited by the State Board of Education, as provided herein, shall be released and paid over to the school district involved.

EDUCATION

Compulsory Attendance—Florida

Chapter 59-412 (House Bill No. 306) of the 1959 Florida Legislature, which became law without the Governor's approval and was filed in the Secretary of State's office on June 19, 1959, amends state compulsory attendance statutes to exempt married students (but authorizes the county boards of public instruction to adopt regulations governing their at-

tendance in public schools) and, upon stated conditions, students who are assigned to schools where the races are commingled and whose parents or guardians object thereto in writing to the board of public instruction. The amended statute appears below, with new language in italics.

AN ACT to amend Section 232.01, Florida Statutes, relating to School attendance; exempt married students from compulsory attendance in public schools; authorizing County Board of Public Instruction of several counties to adopt rules and regulations governing said attendance; providing for the withdrawal of a child from the school in which the races are commingled; providing for an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 232.01, Florida Statutes, is amended to read:

232.01 Regular attendance at school required between ages of seven and sixteen; permitted at the age of six.—All children, *except those who have become married*, who have attained the age of seven years or who will have attained the age of seven years by February 1 of any school years or who are older than seven years of age but who have not attained the age of sixteen years are required to attend school regularly during the entire school term except as hereinafter provided; provided, that a child who attains the age of sixteen years during the school year shall not be required to attend school beyond the date upon which he attains that age; provided, further, that any child who has attained the age of five years and nine months on or before the first day of the month within which schools open in any county during any year shall be admitted at the beginning of the school term or may be admitted at any time during the first month of the school year to the first grade of any school having annual promotions, but if any child is not so enrolled in the first grade during the first month of the school year except for illness as certified by a physician,

he shall not be admitted to the first grade until the beginning of the following school year; and provided, further, that a pupil who has attained the age of five years and eleven months on or before the opening day of any semester shall be admitted at the beginning of the said semester or may be admitted at any time during the first two weeks of the said semester to any school having semi-annual promotions; *provided further, however, that any other provisions of this section notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the board of public instruction. If in connection therewith a requested assignment or transfer is refused by the board, and if no other school facility as defined by section 232.02 shall exist in the county which can and will accept the pupil whose parent or guardian objects to his or her attendance in a school where the races are commingled, the parent or guardian may notify the board in writing that he is unwilling for the pupil to remain in the school to which assigned and the assignment and further attendance of the pupil shall thereupon terminate, and such parent or guardian and pupil shall thereupon be exempt from the operation of sections 232.01 and 232.02.*

Section 2. The county boards of public instruction of the several counties shall have the authority to adopt rules and regulations governing the attendance of married students in public schools.

Section 3. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

EDUCATION

Private Schools—Florida

Chapter 59-471 (Senate Bill No. 382) of the 1959 Florida Legislature, which became law without the Governor's approval and was filed in the Secretary of State's office on June 19, 1959, creates a Board of Private Education with enumerated general powers, including power to issue certificates of approval to private schools which request them and which meet minimum standards specified in the Act and others which the Board may prescribe; to revoke school certificates of approval for failure to comply with certificate requisites; and to revoke teacher certificates for specified grounds and any other grounds prescribed by the Board. Provision is made for appeals from Board orders.

AN ACT relating to private education; creating a board of private education, and prescribing its powers, duties, and the limitations of same; and providing an effective date.

WHEREAS, it has been determined to be the responsibility of the State of Florida to furnish minimum satisfactory educational opportunities to its citizens; and

WHEREAS, it has been determined that to attain this minimum satisfactory education those eligible to receive such educational benefits have the right to choose to attend schools operated by the State or schools maintained and operated by private sources; and

WHEREAS, there properly exists among the citizens of this state diverse philosophy as to desired educational emphasis, the encouragement of which will stimulate the growth of public as well as private education and greatly improve the quality of both; and

WHEREAS, there is a danger that the level of some of the private educational opportunities offered in this state will become substandard and leave much to be desired; and

WHEREAS, in order to promote minimum satisfactory educational opportunities, it is the responsibility of the state to create the means whereby basic academic standards are assured, thereby enabling the citizens of this state to better evaluate the quality of private educational opportunities offered in Florida; THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. PURPOSES OF THE ACT. This chapter is enacted for the promotion of the health, education, and welfare of the citizens of the State of Florida, and is intended to facilitate and promote the acquisition of a minimum satisfactory education by all the citizens of this state.

While in this state there presently exists many fine private schools, there are, on the other hand, some private schools which offer sub-standard education, and do not generally offer those educational opportunities which the citizens of Florida deem essential to our youth and to the ultimate health, education, and welfare of the people of Florida. It is declared to be in the interest of and essential to the public health, education, and welfare that the state create the means whereby minimum satisfactory educational standards may be established so that schools desiring to meet these standards may be identified. The purpose of this identification is to enable the selection of such schools by the citizens of this state, thereby assuring themselves of a minimum satisfactory education. The provisions of this Act are intended to establish those minimum standards necessary to insure that any school meeting such standards offers a minimum satisfactory education. Nothing contained herein is intended in any way to regulate the operations of or admissions to any school in this state. No provision of this Act shall apply to any school except upon request for a certificate of approval, which shall be on a purely voluntary basis.

Section 2. DEFINITIONS. The following terms, when used in this Act, shall have the meaning as hereinafter set out, unless a contrary meaning clearly appears therein:

(1) **PRIVATE SCHOOL.** Private school shall mean any school devoted solely to academic, vocational, or business instruction as defined in this Act, or any combination of same in grades one (1) through twelve (12) or in any of these grades, which is supported in whole or in part by tuition or by endowments or gifts and which does not come within any of the classifications set forth in Section 4 of this Act.

(2) **APPROVED PRIVATE SCHOOL.**

An approved private school shall mean a private school which has an enrollment of not less than ten (10) pupils and maintains an average daily attendance of not less than eighty per cent (80%) of its enrollment, and which has received from the Board of Private Education a certificate of approval pursuant to this act.

(3) **ACADEMIC INSTRUCTION.** Academic instruction shall mean instruction of or pertaining to literary, scientific, humanities, classical or liberal studies as distinguished from business, technical and vocational instruction.

(4) **VOCATIONAL INSTRUCTION.** Vocational instruction shall mean instruction in grades ten (10) through twelve (12) which is primarily directed toward training for a particular trade or vocation, as distinguished from training for a career in business, but which includes academic instructions and which culminates in graduation from secondary school. Vocational instruction would not be designed to prepare the student for college.

(5) **BUSINESS INSTRUCTION.** Business instruction shall mean instruction in grades ten (10) through (12) which is primarily directed toward training for a career in business, whether business generally or a particular phase of business or a particular job in business, as distinguished from training for a particular trade or vocation, but which includes academic instruction and which culminates in graduation from secondary school. Business instruction would not be designed to prepare the student for college.

(6) **BOARD.** Board, as used in this Act, shall mean the Board of Private Education created by this Act for the purpose of determining standards of approval of private schools, voluntarily operating under the provisions of this Act.

(7) **TEACHER.** Teacher shall mean a person engaged in the instruction of others in any private school, voluntarily operating under the provisions of this Act.

(8) **OTHER SCHOOLS.** Other schools shall mean trade school, business school, dance school, art school, driver training school, and other schools operated for a special purpose, and which do not come under the provisions of this Act, or any pri-

vate school which does not voluntarily elect to operate under the provisions of this Act.

(9) **PERSON.** Person shall mean any person, firm, association or corporation.

(10) **CERTIFICATE OF APPROVAL.** A certificate of approval shall be the certificate issued by the Board to a teacher or to a school, pursuant to the provisions of this Act.

Section 3. APPLICATION OF THIS ACT.

The provisions of this Act shall apply only to the private academic, business, and/or vocational schools, as defined in this Act, within the State of Florida; PROVIDED, that only those schools making application as provided herein shall be affected by the provisions of this Act.

Section 4. EXCLUSIONS OF SCHOOLS FROM APPLICATION OF THIS ACT. The following schools shall be excluded from the terms of this Act.

(1) **PUBLIC SCHOOLS.** Any school owned and operated by the State of Florida or any political subdivision thereof.

(2) **KINDERGARTENS.** Any schools owned and operated for children who have not yet reached grade one (1).

(3) **COLLEGES.** Any junior college, college or university.

(4) **SECTARIAN SCHOOLS.** Any parochial, denominational, or sectarian school owned or operated by or under the authority of a religious sect or institution.

(5) **SCHOOLS FOR BLIND RECEIVING PUBLIC FUNDS.** Any school operated for the blind, deaf, or dumb, receiving appropriations from the State of Florida or any political subdivision thereof.

(6) **SCHOOLS FOR EMPLOYEES.** Any school maintained or classes conducted by employers for their own employees.

(7) **OTHER SCHOOLS.** Any trade school, business school, dance school, art school, driver training school, or other type of school which is vocational in character and which does not culminate in the awarding of a high school diploma.

Section 5. PRIVATE SCHOOLS NOT REQUESTING CERTIFICATES. No private school shall be affected by this Act unless and until such school shall submit a request for a certificate of approval under the provisions of this act, and the decision to make application

for said certificate by the school shall always be dependent upon the free, unbridled, unrestricted exercise of the discretion and choice of each private school, that such choice shall be completely and purely voluntary, and shall always remain so.

Section 6. BOARD CREATED, METHOD OF APPOINTMENT.

(1) **CREATION OF THE BOARD AND ITS MEMBERSHIP.** There is hereby created the Board of Private Education which shall consist of seven (7) members, to be appointed by the Governor, each of whom shall be a citizen of the United States and a resident of the State of Florida. Four (4) of such members shall be appointed from among persons who are engaged in administrative or teaching work in an approved private school, and three (3) of such members shall be appointed from among persons who by their efforts have evidenced an interest in the growth and development of approved private schools; provided that for purposes of the appointments to the first Board, those schools shall be deemed approved that are eligible for approval under Section 14 herein.

(2) **NOMINATIONS.** Appointments to the Board may be made from nominations submitted by recognized statewide organizations representing approved private schools in Florida, pursuant to procedures adopted and made a part of the By-Laws of each such organization. Each such nominating organization shall submit not less than two (2) nor more than three (3) candidates for each position to be filled as they may occur.

(3) **RECOMMENDATIONS.** Appointments to the Board may also be made from a list of persons recommended by approved private schools as defined in this Act. Each such recommending school shall submit not less than two (2) nor more than three (3) candidates for each position to be filled as they may occur; PROVIDED, however, that for purposes of appointing the first Board, recommendations as set forth above may be submitted by those private schools eligible for approval under Section 13 herein.

(4) **ABSENCE OF NOMINATIONS AND RECOMMENDATIONS.** Should nominations and recommendations fail to be

made as provided in the preceding subsections, appointments to the Board shall be made, for each vacancy as they may occur, from among qualified persons, as referred to in subsection (1) above; PROVIDED, that if any nominations or recommendations are made under subsections (2) and/or (3) above, appointments shall be from among the persons on those lists.

Section 7. TERMS OF OFFICE. The term of office of the members of the Board shall be for four (4) years; PROVIDED that the first appointments shall be for terms as follows: Two (2) members shall be appointed for two (2) years, two (2) members shall be appointed for three (3) years, and three (3) members shall be appointed for four (4) years. Thereafter the term of office for each person so appointed shall be for four (4) years.

Section 8. REIMBURSEMENT FOR TRAVEL AUTHORIZED. The members and employees of the Board shall receive reimbursement for travel as provided in Section 112.061 Florida Statutes.

Section 9. LEGAL STATUS AND POWERS—A BODY CORPORATE. The Board of Private Education is hereby declared to be a body corporate, public in nature, and may sue and be sued, plead and be interpleaded, in all courts of law and equity, and may contract and be contracted with. The Board shall employ an executive secretary who shall be a person well qualified to carry out the mandates of the Act, and other necessary executives, clerks, employees, and servants and shall have the power to remove them at will, and shall have all of the powers of a body corporate for all of the purposes created by or which may exist under the provisions of the Act or any amendments hereto.

Section 10. GENERAL POWERS OF BOARD. In carrying out the provisions and purposes of this Act, the Board shall have the authority and shall exercise the following general powers.

(1) **ADOPT RULES AND REGULATIONS—FORCE OF LAW.** Adopt and prescribe rules and regulations for the proper carrying out and enforcement of this Act. All rules and regulations and minimum standards adopted by the Board in carrying out the provisions of this Act shall have the

full force and effect of law if not in conflict therewith; PROVIDED, that no rules or regulations may be adopted affecting any school enumerated in Section 4 above or any private school which does not apply for a certificate hereunder.

(2) **PRESCRIBE MINIMUM STANDARDS.** Adopt such minimum standards for curricula, instructional personnel and other phases of education as are considered necessary to carry out the provisions of this Act.

(3) **ACCEPT DONATIONS.** Accept donations, gifts, and grants of money, material, or property.

(4) **ADMINISTER FUNDS.** Accept and administer funds from any person, foundation, association, or the State of Florida, or any agency thereof, in carrying out the provisions of this Act and in conducting research projects, surveys, studies and experiments for the improvement of private education.

Section 11. DUTIES AND RESPONSIBILITIES OF THE BOARD. In carrying out the purposes and objectives of this Act, the Board shall perform the duties prescribed below:

(1) **HOLD MEETINGS.** Hold regular and special meetings for the transaction of business relating to its duties under this Act; PROVIDED that the Board shall hold regular quarterly meetings and may hold such other regular meetings as it may determine by resolution.

(2) **KEEP RECORDS.** Require to be kept by the secretary such records as are necessary to set forth clearly all of its actions and proceedings.

(3) **ADOPT SEAL.** Adopt a corporate seal.

(4) **MINIMUM STANDARDS.** The Board shall establish minimum standards of approval of private schools voluntarily operating under the provisions of this Act which shall insure a minimum satisfactory education.

(5) **ISSUE CERTIFICATES TO SCHOOLS.**

A. ISSUANCE MANDATORY IF CONDITIONS PRECEDENT MET. It shall be a duty of the Board to issue a certificate of approval to any private

school who meets the following conditions precedent: (a) makes application therefor in writing on forms prescribed (b) submits satisfactory evidence that it has complied with the minimum standards of approval as set forth in this act (c) pays the required fee, (d) meets such other conditions as the Board may prescribe. Provided, the Board shall first satisfy itself by investigation that each applicant school has complied with the minimum standards of approval before issuing the certificate of approval.

B. PROVISIONAL CERTIFICATES.

The Board may upon good cause shown issue a provisional certificate of approval to an applicant school which does not meet the minimum standards of approval. Such provisional certificate shall be valid for one (1) year but may be renewed by the Board for an additional year. Provided, however, the Board shall before issuing such a certificate satisfy itself by investigation that the applicant is making adequate effort to meet the minimum standards of approval and said provisional certificate may be revoked at any time it becomes apparent to the Board that such effort to meet the minimum standards is not being continued by the applicant.

C. COST OF INVESTIGATION.

Each applicant school shall pay all costs actually incurred by the Board in making the investigation referred to in this subsection. Provided, however, the application fee submitted by the applicant shall be credited toward said costs and in the event the application fee exceeds the costs, the excess shall be refunded to the applicant. Provided, further, no certificate of approval shall be delivered to any school until the costs set forth herein have been paid to the Board.

D. RENEWAL OF CERTIFICATE.

Every approved school desiring to maintain its approved status shall submit to the Board on or before May 1 of each year an application for renewal

on forms to be prescribed by the Board, which application shall be accompanied by a fee of Ten Dollars (\$10.00). If, upon investigation, it is determined that the standards of Section 16 herein have been met, the Board shall issue a certificate of renewal to said school.

E. EFFECTIVE DATE OF CERTIFICATE SEPARATE CERTIFICATE FOR EACH SCHOOL. Each original certificate shall be effective from the date of issuance to July 1 of the certificate year and all renewals shall be issued for one (1) year from July 1 to June 30 of the next succeeding year and shall be renewed annually thereafter. Each school shall have a separate certificate which shall not be transferable.

(6) ISSUE CERTIFICATES TO TEACHERS.

A. ISSUANCE MANDATORY IF CONDITIONS PRECEDENT MET.

It shall be a duty of the Board to issue a certificate of approval of the proper type, class or rank to any person who (a) makes application therefor in writing on the form prescribed, (b) submits satisfactory evidence that he possesses the qualifications for such a certificate as prescribed by Section 17 of this law and the rules and regulations of the Board, (c) pays the required fee, (d) submits with the application a written statement under oath that he subscribed to and will uphold the principles incorporated in the constitution of the State of Florida and (e) meets such other conditions as the Board may prescribe.

B. TYPES, CLASSES AND RANKS OF CERTIFICATES TO BE ISSUED.

The Board shall also prescribe the types, classes, and ranks of certificates to be issued to teachers, the subjects or fields of instruction which these certificates shall cover, any requirements for such certificates not covered herein, the length of time of the certificates, and the manner of the renewal or extension of such certificate such regula-

tions shall specify as prerequisite for each type, class, and rank of certificate to be granted, a definite amount of college credits in prescribed professional courses and subject fields, and may specify the period of time prior to the application for the certificate within which time a specified portion of such college work shall have been completed, and may require a definite period of time during which the applicant shall have served under supervision in the private schools or public schools of this state or of other states; PROVIDED, that, without limiting the foregoing general terms, the Board may, upon good cause shown, issue a temporary certificate approving a person for teaching in an approved private school who does not meet the requirements for a permanent teacher's certificate, with temporary certificate shall be for one (1) year but may be renewed by the Board for an additional year.

C. EFFECT OF ISSUANCE. Said certificate shall certify that the standard of preparation of said teacher is of such sufficient quality that it has received the approval of the Board, and that the approved status of a school will not be jeopardized by engaging the services of such person.

(7) HEAR AND DETERMINE CONTROVERSIES. To advise and counsel with approved private schools and teachers therein concerning the interpretation and meaning of this law and the rules and regulations adopted by the Board pursuant hereto; and whenever practicable to adjust amicably and settle such controversies arising hereunder as may be submitted to it.

(8) PROVIDE REGISTRATION SERVICE. Maintain in its office a record of teachers approved by the Board as an aid to teachers and private schools which record shall show the position or positions he is approved to fill and such other information as may be helpful to teachers and private schools seeking qualified teachers.

(9) **MAINTAIN OFFICE.** Maintain its official office in Tallahassee, Florida.

(10) **ENTER WRITTEN ORDERS.** In every case appropriate, enter a written order (a) granting or refusing to grant a certificate of approval; (b) revoking a certificate of approval.

(11) **REVOCATION OF CERTIFICATE OF APPROVAL.** The certificate of approval shall be subject to revocation if the holder thereof fails to comply with requisites for approval set out in Section 16 of this Act, PROVIDED that before any certificate of approval is revoked, the holder thereof shall have received, at least thirty (30) days prior thereto, notice from the Board of its intention to revoke said certificate. Such notice shall specify the particular failure of the holder of the certificate to a sufficient degree to enable him to prepare his defense thereto. No certificate shall be revoked except upon notice and hearing. Upon receipt of notice that his certificate of approval has been revoked by the Board, any holder shall promptly return same to the Board.

Section 12. STANDARDS TO BE COMPARABLE TO LEVEL OF PUBLIC SCHOOLS. The standards of approval shall be so designed as to permit easy transfer of students at all grade levels from approved private schools to public schools without demoting the student, and so as to insure that graduates of approved private schools have attained at least the same basic level of educational attainment as graduates of public school systems and are at least as eligible, qualified, and admissible to institutions of higher learning in Florida and throughout the United States.

Section 13. TEMPORARY APPROVAL STANDARDS. Until such time as the Board has prescribed and is adequately administering its standards of approval, those private schools shall be approved which are accredited by the Southern Association of Secondary Schools (as to grades ten (10) through twelve (12) or by regulations of other accepted accrediting agencies (as to grades one (1) through nine (9)).

Section 14. STANDARDS OF APPROVAL TO PERMIT VARIOUS PURSUITS. In prescribing its standards of approval, the Board

shall permit approved private schools to establish, and students thereof to pursue, curricula including academic instruction, vocational instruction, and/or business instruction, as herein defined. Procedures shall be established to advise parents and guardians of students attending approved private schools of the curriculum being pursued by such students.

Section 15. ATTENDANCE—RECORDS AND REPORTS.

(1) **REGULAR ATTENDANCE.** Regular attendance at an approved private school shall be considered regular attendance at a school as required by the Florida Compulsory School Law as set out in Section 232.01, Florida Statutes; provided, however, all rules and regulations necessary to implement compulsory attendance at an approved private school shall be promulgated exclusively by the Board.

(2) **RECORDS AND REPORTS.** Headmasters, principals, executive officers, and teachers in charge of each approved private school shall keep a register of enrollment and attendance and make such reports therefrom as may be required under regulations of the Board, which said register shall show the attendance or absence of each enrolled child for each school day of the year and shall be open for inspection by the Board.

Section 16. REQUISITES FOR APPROVAL No school shall be approved or be permitted to continue its approved status which does not meet the following minimum requirements, and such other requirements as the Board shall, from time to time, promulgate:

(1) **REQUIRED MINIMUM TERM.** No school shall be approved or permitted to continue its approved status which does not provide a program of instruction for a term of at least nine (9) months (180 actual teaching days) each calendar year.

(2) **REQUIRED SUBJECTS TO BE TAUGHT.** No school shall be approved or permitted to continue its approved status which does not include in its curricula of instruction: english, sciences, history, reading, writing, arithmetic, civics, humanities and related subjects and such other subjects as the Board may prescribe.

(3) **REQUIRED DUTIES OF TEACHERS.** No schools shall be approved, or permitted to continue its approved status, unless each and every teacher thereof shall:

A. **BIBLE READING.** Have the opportunity once every day of reading from the Holy Bible in the presence of the pupils; and

B. **EXAMPLE FOR PUPILS.** Labor faithfully and earnestly for the advancement of the pupils under his direction in their studies, deportment, and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty, and patriotism, and the practice of every moral virtue; and

C. **OBJECTIVE FOR PUPILS.** Require the pupils to observe personal cleanliness, neatness, order, promptness, and gentility of manners, avoid vulgarity and profanity and cultivate in them habits of industry and economy, a regard for the rights and feelings of others and their own responsibilities and duties as citizens; and

D. **OTHER DUTIES.** Perform such other duties as the Board shall prescribe.

(4) **REQUIRED QUALIFICATIONS OF TEACHERS—CERTIFICATES OF APPROVAL.** On and after January 1, 1960, no school shall be approved or allowed to retain its approved status if such school shall employ any person as a teacher who is not eligible to hold a certificate of approval issued by the Board pursuant to this Act. To be eligible for a certificate of approval, the applicant must meet the following requirements:

A. **CITIZENS OF UNITED STATES—EXCEPTION.** Be a citizen of the United States; PROVIDED, that the Board shall have authority to prescribe regulations under which a certificate may be issued to a person who is not a citizen of the United States of America and who is not antagonistic to democratic forms of government and who may be needed to teach in the private

schools, or who may be assigned to teach in the state on an exchange basis.

B. **MEET ACADEMIC PROFESSIONAL REQUIREMENTS.** Meet such academic and professional requirements as to prior education and experience as the Board may prescribe.

C. **BE FREE OF NAMED DISEASES.** Be free from malignant, communicable, or mental diseases.

D. **PASS PHYSICAL EXAMINATION.** Pass such physical examination as may be prescribed jointly by regulations of the Board and the State Board of Health.

E. **MORAL CHARACTER.** Be of good moral character.

F. **AGE.** Be of at least twenty (20) years of age.

G. **OTHER REQUIREMENTS.** Meet such other requirements as may be prescribed by the Board.

(5) **HEALTH, SAFETY AND SANITARY REQUIREMENTS.** No school shall be approved or permitted to continue its approved status unless it shall conform to the general laws of Florida, concerning health, safety and sanitary requirements and such other reasonable regulations in these areas as the Board may from time to time promulgate.

(6) **LOSS OF APPROVAL.** Failure of any school or any person employed therein to comply with provisions set out above shall be grounds for loss or denial of the approved status of said school.

Section 17. REVOCATION OF TEACHER'S CERTIFICATE OF APPROVAL. The Board shall have authority to revoke the certificate of any person holding a teacher's certificate of approval issued by the Board for the grounds listed herein, and for any other grounds prescribed by the Board:

(1) **GROUND'S FOR REVOCATION.**

A. **OBTAINED BY FRAUD.** The certificate was obtained by fraud or mistake.

B. INCOMPETENT. The holder is incompetent as a teacher, and therefore fails to furnish the students with a minimum satisfactory education.

C. GROSS IMMORALITY. The holder is guilty of gross immorality, and thus would possibly have an undesirable influence on students.

D. CONVICTED OF CERTAIN CRIMES. Has been convicted of a crime involving moral turpitude by a court of competent jurisdiction.

(2) PROCEDURE FOR REVOCATION OF TEACHER'S CERTIFICATE. Before the Board may revoke a teacher's certificate, it shall notify the teacher by registered mail of the charges against him and the teacher shall have thirty (30) days within which to file an answer to such charges. The Board shall fix a time for hearing at its office in Tallahassee, Florida on the charges and give the accused not less than fifteen (15) days notice of the hearing. Such person may appear at the hearing in person and/or by counsel and defend against such charges.

(3) EFFECT OF REVOCATION OF TEACHER'S CERTIFICATE. The revocation by the Board of the certificate of any teacher may cause the revocation of the certificate of approval of any approved private school thereafter employing such person in a teaching capacity.

Section 18. FEES TO BE PAID BY APPLICANTS FOR TEACHER'S CERTIFICATES. Each applicant for a certificate of approval for teaching in an approved private school of this state shall pay a fee of Ten Dollars (\$10.00) and each applicant for renewal of such

certificate shall pay a fee of Five Dollars (\$5.00), and each applicant for an extension thereof shall pay a fee of Three Dollars (\$3.00). The fee shall be retained whether the certificate, renewal, or extension is granted or not; PROVIDED, that incomplete applications, including fees and overpayments, may be returned. An applicant for a duplicate certificate shall pay a fee of Three Dollars (\$3.00) and shall present evidence establishing his identity as the holder of the original certificate.

Section 19. DISPOSITION OF FEES. All money collected by the Board under this Act shall be remitted by the Board to the State Treasurer to be deposited in a special account to be known as the "Private Education Fund," to be disbursed as provided by law.

Section 20. PROCEDURE FOR APPEAL FROM ORDERS OF THE BOARD. Any person, firm or corporation aggrieved by any order of the Board entered pursuant to this Act may, as a matter of right, take an appeal from such order pursuant to the procedure set forth in the Florida Appellant Rules.

Section 21. If any section, paragraph, sentence, clause, phrase, or other part of this act should be declared unconstitutional or if this act should be declared inapplicable in any case such declaration shall not affect the remainder of this act nor the applicability thereof in any other case.

Section 22. REPEAL. All laws and parts of laws in conflict herewith are hereby repealed.

Section 23. EFFECTIVE DATE. This Act shall take effect July 1, 1959.

Became a law without the Governor's approval.

EDUCATION

Private Schools—Florida

Chapter 59-113 (House Bill No. 989) of the 1959 Florida Legislature, approved May 22, 1959, provides procedures by which private school corporations may be chartered, their charters amended, and such corporations consolidated or merged and dissolved. The powers of such corporations are enumerated; their properties are made exempt from taxation; and regulations are set forth concerning membership, control, and management.

AN ACT relating to corporations; authorizing the incorporation and operation of private schools in the state of Florida; providing for the issuance of charters of incorporation for such schools; providing their officers, directors, powers, duties, limitations and the method of the operation of such schools; repealing all laws or parts of laws in conflict with this act and providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This Act may be cited as "The Private School Corporation Act of 1959", and shall be assigned an individual chapter number.

Section 2. Any twenty-five or more adult persons, who are legal residents of the State of Florida and of the county in which any corporation may be formed hereunder, may form a private school corporation, under the provisions of this Act and such private school shall be incorporated in the following manner:

There shall be presented to one of the judges of the circuit court for the county in which such corporation will operate, a proposed charter subscribed by the intended incorporators, which shall set forth:

(1) The name of the corporation which name shall include the words "Private School."

(2) A designation of the geographic area in which such corporation will operate its school or schools.

(3) The object and purpose of the corporation.

(4) The qualifications of the members and the manner of their designation.

(5) The term for which the corporation will exist, which term may be perpetual.

(6) The names and addresses of the charter members.

(7) The names of the officers who shall manage the affairs of the corporation until the first election of officers.

(8) The procedure by which the by-laws of the corporation shall be made, altered or rescinded.

Section 3. The proposed charter shall be acknowledged by one of the subscribing incorporators before an officer authorized to take acknowledgments of deeds, which said subscribing incorporator shall also take and subscribe to an

oath, to be endorsed on the proposed charter, that it is intended in good faith to carry out the purposes and objectives set forth therein and as provided in this Act.

The Circuit Judge to whom the proposed charter is presented, finding the same to be in proper form and for the objective and purpose authorized by this Act, and in accordance with the provisions and limitations of this Act shall approve the charter and endorse his approval thereon. The charter shall then be recorded in the office of the Clerk of such Circuit Court and from thence forth the subscribers and their associates and successors shall be a non-profit eleemosynary corporation by the name given.

Section 4. The charter of any corporation incorporated under this Act may be amended as follows:

When the members of the corporation at a regular or special meeting held in accordance with its by-laws shall approve a resolution providing an amendment to the charter, a copy of such resolution certified by the president and secretary shall be presented to the Judge of the Circuit Court of the County and if he finds the amendment to be proper in form and substance he shall endorse his approval thereon and it shall be recorded by the Clerk of the Circuit Court and the amendment shall be effective from the date of record.

Section 5. The original charter, with the clerk's certificate of recording thereon, or a duly certified copy thereof, shall be evidence of the contents of the charter in all actions and proceedings, and shall be conclusive evidence of the existence of such corporation in all actions and proceedings where the question of its existence is only collaterally involved and prima facie evidence in all other actions and proceedings.

Section 6. Any such corporation may be dissolved upon its petition to the Circuit Judge who shall order notice thereof to be published for such period of time as he may deem expedient and upon proof of such publication he may decree dissolution and make all necessary orders and decrees for the settlement of the affairs of such corporation, taking care that the claims of creditors be satisfied to the extent of the assets of the corporation.

Section 7. (1) Any two or more corporations existing under the provisions of this Act and operating within the same county may consoli-

date into a new corporation or merge into any one of the constituent corporations, as shall be specified in the consolidation or merger agreement. The board of directors of such corporation or a majority of the members of such corporation at a meeting however duly called or held, as desire to consolidate or merge may enter into an agreement signed by a majority of the members of the several boards of directors or as the case may be, by a majority of such corporation members at such meeting prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect, and stating such other facts as are necessary to be set out in the charter with such other details and provisions as are necessary or desirable. (2) The agreement shall be submitted to a meeting of the members of record of each corporation. Notice of the time, place and purpose of the meeting shall be given to every member of such corporations. Upon adoption of the agreement by the majority of the corporate members of each corporation the secretary of each corporation shall certify the fact of that approval on said agreement. The agreement so adopted and certified shall for each corporation be signed and acknowledged by the president or vice-president. The agreement so certified and acknowledged by each corporation shall be filed in with the clerk of the circuit court in the county where such corporations exist and when approved by a circuit judge of such county the consolidation or merger shall be effective.

Section 8. A corporation incorporated under the provisions of this Act to operate in an entire county, or major area thereof may operate separate schools in such area and in such locations as it may deem necessary or advisable and under such rules and regulations as specified in the by-laws.

Section 9. The property of any private school corporation incorporated under the provisions of this Act shall be exempt from taxation in accordance with Section 192.06, Florida Statutes, 1957, sub-section (3) and as otherwise provided by law.

Section 10. Any corporation existing under the provisions of this Act, unless otherwise limited by its charter or by-laws shall have the following powers:

- (1) To purchase, own, lease, hold, sell, convey, assign, transfer, mortgage, pledge

or otherwise dispose of real and personal property tangible and intangible.

- (2) To borrow money and contract debts whenever necessary for the transaction of its business or for the exercise of its corporate powers, rights and privileges, or for any other lawful purpose; to issue bonds, promissory notes, bills of exchange, debentures and other obligations and evidences of indebtedness, payable at a specified time, or payable upon the happening of a specified event, whether secured by mortgages, pledge or otherwise, or unsecured for money borrowed or in payment of property purchased or acquired, or for any other lawful object.

- (3) To accept gifts from members and non-members and other legitimate sources.

- (4) To do all things necessary and proper for the accomplishment of the objectives and purposes of the corporation as enumerated in its charter, its by-laws, or any amendment thereof, or necessary or incidental to the attainment of the objectives and purposes of the corporation.

- (5) To sue and be sued.

Section 11. The membership of a corporation existing under the provisions of this Act shall be composed of persons who have been approved for membership, as provided by the charter and by-laws of the corporation.

Section 12. The control of such corporation shall be vested in a Board of Directors of not less than 5 nor more than 11 (to be specified by the charter) elected for the ensuing year by a majority vote of the members present at the annual meeting of the membership. The Board of Directors, from and by its membership and by majority vote thereof at the first regular meeting following the annual meeting of the membership shall elect the following officers whose duties in addition to those prescribed by the by-laws shall be as follows:

- (1) A President who shall be the chief executive officer of the corporation and who shall preside at all meetings of the members and of the Board of Directors and shall perform such other duties as may be prescribed by the by-laws or directed by the Board of Directors.

- (2) A Vice-president who in the absence or inability of the President to perform his duties shall act as President for the

duration of such absence or inability and who shall perform such other duties as may be prescribed by the by-laws or directed by the Board of Directors.

(3) A Secretary-Treasurer who shall keep the minutes of all meetings of the corporation, shall receive and keep all corporate funds and securities; shall keep all accounts and records of the corporation; examine, audit, adjust and settle all accounts of the corporation and perform such other duties as may be prescribed by the by-laws or directed by the Board of Directors.

Only the Secretary-Treasurer, when authorized by the Board of Directors, shall receive any monetary reward for his services, except actual and reasonable expenses while performing services for the corporation.

Section 13. Any corporation organized and existing under this Act shall be administered, supervised, operated, financed and controlled exclusively by private persons and private entities and their funds. All persons while acting in any public official capacity are hereby specifically prohibited from engaging in any manner

in such administration, supervision, operation, financing and control of the affairs of such corporation.

Section 14. If any section, sentence, clause, phrase, word, or provision of this Act shall be held to be unconstitutional, the remaining parts of this Act shall not be impaired or affected thereby, but shall remain as a complete expression of the legislative intent.

Section 15. The provisions of this Act shall be deemed to be accumulative and supplemental to any other powers and authority for the creation of corporations not for profit as set out in Chapter 617 of the Florida Statutes.

Section 16. All laws or parts of laws, whether general, special, or local in application, in conflict with this Act are hereby repealed.

Section 17. This Act shall take effect immediately upon becoming a law.

Approved by the Governor May 22, 1959.

Filed in Office Secretary of State May 22, 1959.

EDUCATION

School Officials—Arkansas

Act 207 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 25, 1959, provides for the continuation of official duties by school district directors incarcerated because of failure or refusal to comply with racial integration court orders.

AN ACT Relating to the Office of School Board Director, and the Meetings and Official Actions of Boards of Directors of School Districts; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. In the event any school district director is incarcerated by order of any court by reason of such director's failure or refusal to comply with any court order pertaining to racial integration in public schools, such director's office shall not be declared or become vacant by

reason of his incarceration; and any action taken in his absence of such incarceration by the board of which he is a member, shall be void ab initio.

Section 2. It shall be the duty of any sheriff having custody of any such director to make suitable arrangements for school board meetings to be held and conducted at the place of any such member's incarceration.

Section 3. If for any reason any section or provision of this act shall be held to be unconstitutional, or invalid for other reason, it shall not affect the remainder of this act.

Section 4. It has been found and is hereby declared by the General Assembly: that, generally, a currently serving director of a school district is best qualified to pass upon questions relating to integration of the races in his district; that his office of school district director should not be declared or become vacant because of his incarceration as aforesaid; that provision should be made to enable any such director to take part

in all official actions of the said board of directors; and that for said reasons this act should become effective without delay. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety shall take effect and be in full force on and after the date of its approval.

EDUCATION

Teacher Retirement—Arkansas

Act 55 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on February 17, 1959, authorizes teachers in certain non-profit schools to continue their membership in the teacher retirement system of the state of Arkansas.

AN ACT to Authorize Certain Persons to Continue Their Membership in the Teacher Retirement System of the State of Arkansas; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Any member in good standing of the Teacher Retirement System of the State of Arkansas shall be eligible for continued membership in the said system, on the same terms and conditions, except that the said members' contributions to the system shall be matched

either by such member or by the employing private school corporation, whenever such member shall enter the employment of any non-profit private school corporation organized and existing under the laws of this state, provided any such private school has been accredited by the State Board of Education.

Section 2. The Board of Trustees of the Teacher Retirement System shall adopt such reasonable rules and regulations, not inconsistent with the purposes and intent of this Act, as shall be necessary or proper to facilitate its operation.

EDUCATION

Tuition Grants—Arkansas

Act 46 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on February 13, 1959, authorizes school districts or the State Department of Education to grant financial aid to persons who are prohibited from attending public schools because of reasons beyond his or her control.

AN ACT authorizing school districts and/or the State Department of Education to grant financial aid under certain conditions to persons of school age; and for other purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Whenever, for any reason beyond his or her control, any person of school age, except those recognized as having special problems, shall be prohibited from attending public school, such person, or his or her parents or guardian, may make application to the local

school district and/or the State Department of Education for financial aid; and, upon approval of each such application by the boards, respectively, thereof, the said local school district and State Department of Education are hereby authorized and directed to grant financial aid in order that any such person may receive gratuitous instruction in this State. Provided, that no funds pledged or required to meet the contractual obligations of the said local school district or State Department of Education shall be usable for the aforesaid purpose.

Section 2. The local school district board and the State Board of Education shall have the power to adopt, and enforce, such reasonable rules and regulations as they shall determine, respectively, to be necessary or desirable to ef-

fectively carry out the provisions of this act; and the decisions of each such board with respect to the approval of applications and the amount of financial aid to be granted shall be final, and not subject to appeal.

Section 3. Appropriations made available to the State Department of Education for aid to local school districts shall be usable for granting financial aid under the provisions of this act, and such aid as is granted hereunder by said State Department of Education shall be charged to the allotment of State aid otherwise payable to the school district of the grantee.

Section 4. If for any reason any section or provision of this act shall be held to be unconstitutional, or invalid for other reason, it shall not affect the remainder of this act.

EDUCATION

Tuition Grants—Arkansas

Act 236 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 26, 1959, authorizes the State Board of Education to make tuition grants to pupils who, in order to avoid attending an integrated school, desire to attend a segregated public or private school.

AN ACT Authorizing the State Board of Education to Make Tuition Grants for the Benefit of Certain Persons of School Age; and for Other Purposes.

WHEREAS, the Supreme Court of the United States predicated its school integration decision upon the psychological effect of segregated classes upon children of the Negro race, and, at the same time, ignored the psychological impact of integrated schools upon certain white children who observe segregation of the races as a way of life; and

WHEREAS, legislation is necessary in order to protect the health, welfare, well-being, and educational opportunities of such white children; NOW THEREFORE

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. No person eligible to attend public schools shall be required to attend a school with students of another or different race in order to exercise his right under the Constitution of this State to receive gratuitous instruction.

Section 2. Whenever the school which any such person would normally attend shall be or become racially integrated, the parent, guardian or other persons in loco parentis of any such person may make application to the State Board of Education for tuition grants for use in paying the cost of instruction in any other public school or accredited non-profit non-sectarian private school in this State which is not racially integrated.

Section 3. Any such persons entitled to tuition grants hereunder shall be those whose parents, guardians or other persons in loco parentis of such persons make affidavit, and establish to the satisfaction of the State Board of Education, that the welfare of such person would be best served if such person attended a school other than the racially integrated public school which he normally would attend.

Section 4. The amount of the tuition grant in each such instance shall be calculated on the basis of the average per capita expenditure per student for maintenance and operation during the next preceding school year in the public school which any such person would normally attend, or in the public school which any such person proposes to attend, whichever amount is the lesser; or, if any such person proposes to attend a duly accredited school operated by a non-profit private school corporation, the amount of the tuition grant shall be the standard tuition charge made by such private school, or the amount of the said average per capita expenditure per student for maintenance and operation during the next preceding school year in the public school which any such person would normally attend, whichever amount is the lesser.

Section 5. The State Board of Education shall process, consider and pass upon all applications received by it under the provisions of this act, and each applicant shall be advised by said Board of its decision. The decision of the State Board of Education with respect to each such application shall be final and not subject to appeal. In each instance in which the application for tuition grants shall be approved by

said State Board of Education, the Board shall from time to time cause voucher-warrants to be issued, in amounts predetermined in the manner hereinbefore set forth, payable to the applicant, and the proceeds of said voucher-warrants shall be used only for the purposes for which issued. Provided, that no payment shall be made for the benefit of any such person for any period of time during which any such person shall receive the benefits provided by Act 5, approved September 12, 1958.

Section 6. Appropriations of funds from time to time made available to the State Board of Education including but not limited to Minimum Foundation Program Aid shall be usable by said Board for the purpose of paying the said tuition grants hereinbefore provided for; and the amounts so paid out as tuition grants for the benefit of any such person shall be deducted from the State funds otherwise allocable to the school district having jurisdiction over the school any such person normally would attend.

Section 7. The State Board of Education shall have the authority to adopt, and enforce, such reasonable rules and regulations, not inconsistent with the provisions hereof, as it shall determine to be necessary or proper for the administration of the provisions of this act; and in aid of any such purpose it may require that all such applications shall be made on standard printed forms to be provided by said Board.

Section 8. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, it shall not affect the remainder of this act.

BLOOD BANKS Labeling—Arkansas

Act 482 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on April 2, 1959, provides for labeling of human blood used or proposed to be used for blood transfusions, according to the race of the donor. Provision is made for waiving provisions of the act during an emergency.

AN ACT to provide that all human blood used or proposed to be used for blood transfusions shall be labeled according to the race of the

donor; to provide that no human blood not labeled in accordance with the provisions of this act shall be used for blood transfusions

in this state; to provide that any person about to receive a blood transfusion or a parent or the next of kin of said person shall be informed of the race of the donor of the blood, if blood from a person of a different race is to be used; to provide that a doctor may proceed with a transfusion without compliance with the provisions of this act if an emergency exists; to provide that emergency and disaster areas are exempt from the provisions of this act if the emergency has been declared by the governor, or a federal agency or other agency or authority having the authority to declare an emergency; to provide a penalty for the violation of the provisions of this act; and for other purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. All human blood used or proposed to be used in the State of Arkansas for transfusions of blood, except such units of blood which will have been transported across the State line into Arkansas, shall be labeled with the word "Caucasian", "Negroid", or "Mongoloid" or some suitable designation so as to clearly indicate the race of the donor of such blood. No human blood not labeled in accordance with the provisions of this Act shall be used for transfusions in the State of Arkansas.

Section 2. Any person about to receive a blood transfusion, or a parent of said person, or the next of kin of said person shall be informed of the race of the donor of the blood proposed to be used if blood from a person of a different racial classification is to be used.

Section 3. In the event that there are, in the opinion of the doctor, emergency circumstances existing, a transfusion may be given without regard to the provisions of this Act. An emergency shall be deemed to exist when in the opinion of a medical attendant, such as a practicing physician, intern or resident, it is necessary that immediate action be taken.

Section 4. The provisions of this Act shall not apply to emergency and disaster areas if such an emergency has been declared by the Governor, or a federal agency or other agency or authority having the authority to declare such an emergency.

Section 5. Any person who shall violate any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Hundred (\$100.00) Dollars or shall be imprisoned for not more than thirty (30) days, or both.

Section 6. All laws and parts of laws in conflict herewith are hereby repealed.

Section 7. It is hereby found and declared by the General Assembly that at the present time there is no law in this State which requires that blood to be used for transfusions be labeled to show the race of the donor and that such law is necessary to protect the health and welfare of the citizens of this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

CRIMINAL LAW Bombing—Florida

Chapter 59-29 (House Bill No. 434) of the 1959 Florida Legislature, approved May 7, 1959, makes it a felony: (1) to throw, place, discharge, or attempt to discharge any bomb or other deadly explosive with intent to do bodily or property harm to any person; (2) to threaten to throw, place, or discharge any such explosive with any such intent; and (3) to make a false report, with intent to deceive or misinform any person, concerning the placing or planting of any such explosive; and provides penalties therefor.

AN ACT relating to the use of bombs; providing the throwing, placing, discharge, or attempt

to discharge of any bomb, dynamite, or other deadly explosive with intent to do bodily

harm or to do damage to property of another person be deemed a felony; making it a felony to threaten or make false reports of bombing; providing penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. It shall be unlawful for any person to throw, place, discharge, or attempt to discharge any bomb, dynamite, or other deadly explosive with intent to do bodily harm to any person or with intent to do damage to the property of any person and any person convicted thereof shall be guilty of a felony and punished in the following manner:

(1) When such action, or attempt at such action, results in the death of the person intended, or any person, the person so convicted of such felony shall be punished by death, unless a majority of the jurors trying said cause shall request mercy, in which event the penalty shall be changed from death to life imprisonment in the state prison.

(2) When such action, or attempt at such action, results not in the death of any per-

son, but does result in personal injury to a person or in damage to the property of any person, the person convicted of such felony shall be punished by imprisonment in the state prison for life, or for any number of years not less than twenty (20) years.

Section 2. It shall be unlawful for any person to threaten to throw, place, or discharge any bomb, dynamite, or other deadly explosive with intent to do bodily harm to any person or with intent to do damage to any property of any person and any person convicted thereof shall be guilty of a felony and punished by imprisonment in the state penitentiary for not more than twenty (20) years.

Section 3. It shall be unlawful for any person to make a false report, with intent to deceive, mislead, or otherwise misinform any person, concerning the placing or planting of any bomb, dynamite, or other deadly explosive and any person convicted thereof shall be guilty of a felony and punished by imprisonment in the state penitentiary for not more than ten (10) years.

Section 4. This act shall take effect immediately upon becoming a law.

CRIMINAL LAW

Bombing Threats—Arkansas

Act 300 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 26, 1959, prohibits the communication of a threat or warning of bomb damage to a public or private institution, except where there are reasonable grounds for believing such a danger exists.

AN ACT to Prohibit the Communication to Any Person, or Private or Public Institution of This State, a Threat or a Warning of Impending Danger From a Bomb or Other Explosive, Except Where There Are Reasonable Grounds for Believing That Such Danger Actually Exists.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. It shall be unlawful for any per-

son to communicate to another person, or to any public or private institution of this State, by telephone, writing or in any other manner, a threat or a warning that a bomb or other explosive has been planted in any place where same would constitute impending danger to any person or persons therein or thereat; provided that any such warning based upon reasonable grounds for believing that such danger exists, shall not be a violation of this act.

Section 2. Any person who violates the pro-

visions of this act shall be guilty of a felony, and, upon conviction, shall be punished by a fine of not less than one thousand dollars (\$1,000.00)

nor more than five thousand dollars (\$5,000.00), or imprisonment in the State Penitentiary for not more than five years, or both.

CRIMINAL LAW

Uniform Post-Conviction Act—Arkansas

Act 227 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 25, 1959, repeals the Uniform Post-Conviction Act in that state.

AN ACT to Repeal Act 419, Ark. Acts of 1957 [Ark. Stats. (1947) Sections 43-3101—43-3110]; Providing for a More Efficient Criminal Appeal Procedure.

WHEREAS, since the passage of Act 419, Ark. Acts of 1957, the efficient procedure of criminal appeals has been disrupted, in that convicted persons have abused the orderly process of the judicial system; and

WHEREAS, it is to the best interest of the State that this act be repealed: NOW, THEREFORE,

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Act 419, Ark. Acts of 1957 [Ark. Stats. (1947) Sections 43-3101—43-3110] is hereby repealed.

Section 2. It has been found and is declared by the General Assembly that Act 419, Ark. Acts of 1957, has disrupted the efficient procedure of criminal appeals and has resulted in gross abuse of the orderly process of the judicial system; that there is urgent need to eradicate this defect; and that enactment of this measure will provide the needed remedy. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

EMPLOYMENT

Fair Employment Laws—Missouri

The St. Louis, Missouri, Board of Aldermen on May 29, 1959, adopted a resolution citing the city's Fair Employment Practice ordinance which makes it unlawful for contractors to discriminate racially in employment of persons on public works in the city financed from "municipal revenues or bond issue funds." [2 Race Rel. L. Rep. 468 (1956)], taking note of reported racial discrimination in the employment of skilled workers in an urban renewal project in the city financed both from federal funds and "municipal revenues or bond issue funds" on the part of certain contractors who claimed that the ordinance was inapplicable to them because they were not being paid for their work from city funds, and providing for the appointment of an aldermanic committee to inquire into the applicability of the ordinance to this and similar projects and to determine whether additional legislation is needed to achieve the spirit and purpose of the ordinance.

WHEREAS, Ordinance No. 47957, approved July 10, 1956, provides for Fair Employment Practice procedures and makes it unlawful for

any contractor, subcontractor or employer on public works of the City of St. Louis, paid for in whole or in part from "municipal revenues

or bond issue funds" to refuse to hire an individual or to discriminate in the hiring, tenure, promotion or demotion of employees because of race, color, religion, national origin or ancestry, and

WHEREAS, the City of St. Louis is engaged in awarding and in letting contracts for public works and is further engaged in an urban renewal and redevelopment program using "municipal revenues or bond issue funds" and funds from the Federal Government for the elimination of its slums, blight and insanitation, and

WHEREAS, under Ordinance 46497 approving the first of the urban renewal projects, known as the Plaza Project, private property was acquired with "municipal revenues or bond issue funds" and construction of buildings has now commenced, and

WHEREAS, charges of discrimination in connection with the employment of skilled Negro workers on the Plaza Project have been made and widely publicized, and

WHEREAS, certain of the contractors constructing buildings in the Plaza Project claim that Ordinance No. 47957 is not applicable because they are not being paid for their construction work from "municipal revenues or bond issue funds" of the City of St. Louis, and

WHEREAS, the position taken by such contractors, if not in violation of the ordinance as

stated in an opinion from the City Counselor, clearly tends to defeat the purpose and spirit of the ordinance, and

WHEREAS, the Board of Aldermen is desirous of keeping itself informed as to how ordinances are being observed, applied and enforced and is duty bound to conduct investigations, where indicated, to determine whether a need exists for legislation in any given matter whether of initial or amendatory nature.

NOW THEREFORE, BE IT RESOLVED:

1. That a special committee of at least five aldermen be appointed forthwith to inquire into the applicability of Ordinance 47957 and other ordinances germane to construction contracts now being performed in the aforesaid Plaza Project and similar contracts involving municipal revenues or bond issue funds whether in existence, in immediate contemplation, or planned to arise in the future;

2. That said special committee, shall make a determination and report thereafter as to whether a need exists for further legislation of any kind or character requisite toward a continuing achievement of the spirit and purpose of Ordinance 47957, and

3. That said special committee is hereby delegated the power to subpoena witnesses and order the production of books and papers pursuant to duties hereby imposed upon it.

GOVERNMENTAL FACILITIES

Beaches and Parks—Florida

Chapter 59-377 (House Bill No. 990) of the 1959 Florida Legislature, approved June 17, 1959, authorizes the sheriff of any county to close temporarily "any public beach, park or other public recreation facility within his jurisdiction" upon the occurrence of certain conditions, and provides for subsequent re-opening by him upon abatement of the conditions under which he had closed it.

AN ACT authorizing the sheriff of any county of the State of Florida to close any public beach, park, or other public recreation facility within his jurisdiction when disorderly conditions exist or threaten to take place.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The sheriff of any county of the state of Florida is hereby authorized to tem-

porarily close any public beach, park or other public recreation facility within his jurisdiction when in his discretion conditions exist which present a clear and present or probable threat of violence, danger or disorder, or at any time a disorderly situation exists which in his opinion warrants such action.

The power of the sheriff in exercising the

authority conferred herein shall be full, complete and plenary.

Section 2. Any public recreation facility closed pursuant to the provisions of this act shall be reopened by the sheriff when the conditions upon which such closing was predicated have abated.

Approved by the Governor June 17, 1959.

GOVERNMENTAL FACILITIES

Disposal—Arkansas

Act 224 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 25, 1959, authorizes the state and its political subdivisions to "sell, lease, grant, exchange or otherwise dispose of" parks, playgrounds and other governmental recreational facilities.

AN ACT to Authorize the State, or Any County, Municipal Corporation or Other Political Subdivision Thereof to Sell, Lease, Grant, Exchange or Otherwise Dispose of Any Property or Interest Therein Comprising Parks, Playgrounds, Golf Courses, Swimming Pools, or Other Property Which Has Been Dedicated to Such a Use by Any Private Person or Corporation and Later Acquired by the State, or Any County, Municipal Corporation or Other Political Subdivision Thereof; to Define the Terms, Conditions, and Method of Such Disposal; to Define What Official Shall Have Such Right of Disposal; to Repeal Conflicting Laws; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Any general or local law to the contrary notwithstanding, the State or any municipal corporation, county or other political subdivision thereof, shall have authority to sell, lease, grant, exchange or otherwise dispose of any property or interest therein comprising parks, playgrounds, golf courses, swimming pools, or other property which has been dedicated to a public use for recreational or park purposes, or has been dedicated to a public use for recreational or park purposes by a private citizen, corporation, or association, and thereafter acquired by the State, county, city or other

political subdivision thereof, without regard to whether said public use has been previously abandoned, or that said property has become unsuitable or inadequate for the purpose for which originally dedicated, said disposition to be on such terms and conditions as may be deemed desirable or necessary. Provided, however, that any lease under this act shall be for a period not to exceed five years.

Section 2. Such sale, lease, grant or disposal shall be in the discretion of, and executed by:

- (1) the Governor, as to State property;
- (2) the county court as to county property;
- (3) the mayor and council, city commissioners, or other governing authority, as to property of a municipal corporation.

Section 3. Any sale, lease, grant, exchange or other disposal of any property under the provisions of this act shall be made only after advertising such in a newspaper in which legal advertisements are published for the county in which the land and/or other facilities to be disposed of lies, once a week for four weeks. Such advertisements shall describe the property, shall state the manner of disposition to be made, shall specify the time, and place of such disposition, and shall state any other requirements stipulated by the disposing instrumentality of government, including an award to the highest responsible bidder, subject to the provisions herein con-

tained. In the event the property to be sold shall lie in more than one county, such advertisement shall be run once a week for four weeks in the newspaper in which legal advertisements are published for all such counties. All sales and/or other dispositions made under the provisions of this act shall be made under the terms of the advertisement for cash sale, rental, or lease consideration. Provided, however, that the selling or disposing authority shall have the right to reject all bids in the event the high bid shall prove unsatisfactory for any reason, and said property shall then be re-advertised and disposed of under the provisions above set out. All State property required to be advertised under this bill shall also be advertised in two additional newspapers of general circulation in this State.

Section 4. Nothing herein shall be construed

as impairing the obligation of any contract provision, bond issue or other indebtedness thereon, whether by way of reversionary clause or otherwise.

Section 5. All laws and parts of laws in conflict herewith are hereby repealed.

Section 6. It has been found and is declared by the General Assembly of Arkansas that there is a dire need for providing a method of disposing of or leasing certain publicly owned recreational facilities in the State, and the enactment of this bill will provide such method. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

HOUSING

Contiguously Located Housing—Connecticut

Public Act No. 113 of the 1959 Connecticut General Assembly, approved May 12, 1959, extends the coverage of the state Public Accommodations Act, which prohibits the denial, because of an applicant's race, creed, or color, of full and equal use of enumerated kinds of accommodations, including publicly-assisted housing, to include also contiguously located housing as defined by the instant Act. The Act, as extended, is reproduced below with new language in italics.

AN ACT defining the coverage of the public accommodations act.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 53-35 of the general statutes is repealed and the following is substituted in lieu thereof: All persons within the jurisdiction of this state shall be entitled to full and equal accommodations in every place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed or color of the applicant therefor shall be a violation of the provisions of this section. Any discrimination, segregation or separation, on account of race, creed or color, shall be a violation

of this section. A place of public accommodation, resort or amusement within the meaning of this section means any establishment, which caters or offers its services or facilities or goods to the general public including but not limited to, public housing projects and all other forms of publicly assisted housing, *and further including any housing accommodation offered for sale or rent which is one of five or more housing accommodations all of which are located on a single parcel of land or parcels of land that are contiguous without regard to highways or streets, and all of which any person owns or otherwise controls the sale or rental.* Any person who violates any provision of this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days or both.

ORGANIZATIONS

Registrations, Filing of Information—Arkansas

Act 225 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 25, 1959, provides that the county judge may require organizations "engaged in activities designed to hinder, harass, or interfere with the duties of the State of Arkansas to control and operate its public schools" to file with the county clerk's office information as to its organizational structure, location, and purposes.

AN ACT to Require Certain Organizations to File Certain Information Under Oath in the County Clerk's Office Upon the Request of the County Judge; Providing a Penalty for Violations and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. The term "organization" as used herein means any group of persons, whether incorporated or unincorporated, and includes any civic, fraternal, political, mutual benefit, legal, medical, trade or other kind of organization.

Section 2. If the county judge of any county of this State has reason to believe that any organization that is operating within any county of this State is engaged in activities designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public schools, he shall hold a public hearing to make a determination if such an organization is operating within his county and is engaged in activities designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public schools. The organization must be given five days' notice by registered mail addressed to its county or State office. If a determination is made by the county judge after such a hearing that the organization is engaged in activities designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public schools, he shall order the organization to file with the county clerk's office the following information, subscribed under oath, before a notary public, within seven days after such order is made:

- (1) the official name of the organization and list of members;
- (2) the office, place of business, headquarters or usual meeting place of the organization;
- (3) the officers, agents, servants, employees or representatives of the organization;

(4) the purpose or purposes of the organization;

(5) a statement disclosing whether the organization is subordinate to a parent organization; and if so, the name of the parent organization.

It shall be the duty of the person having custody or control of the records of the organization to furnish the information herein required.

Section 3. Information filed pursuant to Section 2 of this act is hereby declared public and subject to the inspection of any interested party.

Section 4. Any person or organization who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200.00), and each day of violation shall constitute a separate offense. All penalties collected under this section shall be forwarded to the State Treasurer and by him credited to the common public school fund.

Section 5. The county clerk shall receive the sum of two dollars (\$2.00) for recording the information as herein required which sum shall be forwarded to the State Treasurer and there credited to the common public school fund.

Section 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared to be severable.

Section 7. It has been found and declared by the General Assembly that it is vital to the public interest and welfare that information to the extent herein provided be obtained with respect to organizations whose activities are designed to hinder, harass and interfere with the

powers and duties of the State in the orderly administration of government and the public school system, and enactment of this bill will tend to alleviate such adverse conditions. There-

fore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

PUBLIC ACCOMMODATIONS Buses—Arkansas

Act 81 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on February 20, 1959, provides for the numbering of seats and assignment of passengers to seats on intra-state buses, and provides penalties for refusal to take assigned seats.

AN ACT to Regulate the Seating of Passengers on Motor Buses Operating Between Cities and Towns; to Provide Penalties for Violations of This Act; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Each seat and portion of aisle space used for passengers on motor buses operating between cities and towns in Arkansas shall be numbered. The maximum seating capacity of each such motor bus shall not be greater than the manufacturer's rated capacity, but passengers may be permitted to stand provided each such passenger is assigned a standing place in the bus in keeping with the provisions of this Act.

Section 2. Each passenger upon entering such a motor bus, shall be assigned to a numbered seat or standing place. Seats and standing places shall be assigned in such manner as to insure: (1) an equal distribution throughout the bus of the weight of the passengers being transported, as nearly as practicable, to secure the comfortable, safe, efficient operation of the bus, to the end that traffic hazards likely to result in accidents or collisions may be minimized; (2) the maximum convenience, welfare, health, and safety of the passengers being transported that the comfort, life, limb, and person of said passengers will not be inconvenienced, endangered or threatened by collision, violence, or otherwise; (3) the peace and good order among said passengers being transported.

Section 3. It shall be unlawful for any person to occupy any seat, standing space, or any

other space on such motor bus except that assigned by the operator thereof. Any passenger who refuses to accept and occupy the space assigned to him, and who, upon tender of the fare paid, refuses peaceably and without disorder to remove himself from the motor bus after being requested so to do by the driver thereof, shall be guilty of violating the provisions of this Act and shall be punished as provided herein.

The driver of any such motor bus may cause any person violating the provisions of this Act to be delivered to the proper authority for arrest.

Section 4. Any person violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Ten Dollars (\$10.00) nor more than Fifty Dollars (\$50.00) or by imprisonment for not more than thirty (30) days, or by both such fine and imprisonment. The owners and operators of such motor buses shall not be liable to passengers on account of their reasonable observance of this Act.

Section 5. It is hereby found and declared by the General Assembly that regulation of the seating of passengers on motor buses is necessary to insure the safety, comfort, convenience and health of such passengers; that at this time there is no law in this State providing for proper regulation thereof; and, that this Act will provide such proper and necessary regulation. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

PUBLIC ACCOMMODATIONS

Owner's Control of Premises—Arkansas

Act 14 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on February 6, 1959, makes it unlawful for any person to refuse to leave the business premises of any person when requested by the owner or manager, and makes it unlawful to encourage the violation of the act.

AN ACT to Render It Unlawful for Any Person to Refuse to Leave the Business Premises of Any Person When So Requested by the Owner or Manager Thereof; to Render It Unlawful for Any Person, Firm, Association, Corporation or Other Organization to Aid, Encourage, Counsel or Assist Any Person or Persons to Do Any Act in Violation of the Provisions of This Act; to Authorize the Removal of Any Person Refusing to Leave the Premises at the Request of the Owner or Manager of Such Premises; to Provide Penalties for Violations of This Act; and for Other Purposes.

WHEREAS, the General Assembly recognizes the right of all merchants and other business people, other than common carriers, to serve or do business with, or to refuse to serve or do business with, such persons as they choose, and

WHEREAS, the General Assembly recognizes the right of all merchants and other business people other than common carriers, to admit to or to exclude from their premises such persons as they may choose, NOW, THEREFORE

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Any person who after having entered the business premises of any other person, firm, or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment.

Section 2. Any person, firm, association, corporation, or other organization by whatever name known, who or which shall cause, procure, encourage, induce, aid, assist or counsel any person or group of persons to enter, or who may have entered, the business establishment of another, other than a common carrier, to refuse to

leave such premises when requested to do so by the owner or manager thereof shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) or by imprisonment for not to exceed thirty (30) days, or both such fine and imprisonment.

Section 3. If any person or group of persons shall enter the business premises of any other person, firm, or corporation, other than a common carrier, and shall refuse to depart therefrom when so requested by the owner or manager thereof, it shall be the duty of any sheriff, deputy sheriff, chief of police, policeman, city or town marshal or deputy marshal, constable or deputy constable, upon request of the owner or manager of such business premises, to remove therefrom such person or persons so refusing to depart, without regard to race, sex or age, by using only such force as is reasonably necessary to effect such removal. No such law enforcement officer or his surety or the securities on his official bond shall be held liable civilly or criminally to any person so removed from such premises.

Section 4. If the owner or manager of any business premises shall apply to any of the peace officers mentioned in Section 3 hereof for the removal of any person or persons from such premises after such person shall have refused to depart, and such peace officer shall fail, decline, or refuse to remove such person or persons from the premises, then the owner or manager may either personally or with the assistance of his agents, servants or employees remove such person or persons from the premises. In removing such persons only such force shall be used as is reasonably necessary to effect such removal and no such owner or manager or his agents, servants or employees shall be liable civilly or criminally for such removal.

Section 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of the act and the application of such provision to other

persons or circumstances shall not be affected thereby.

Section 6. The provisions of this Act shall be supplemental and cumulative to existing laws and rights in this State and shall not be construed as repealing any of said laws or defeating any of said rights.

Section 7. It is hereby found and declared by the General Assembly of Arkansas that the rights and privileges of persons owning business

establishments to serve or do business with or to refuse to serve or do business with such persons as they choose and to admit to or exclude from their premises such persons as they choose are not clearly prescribed by law and that this Act is immediately necessary to clarify those rights and privileges. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.

PUBLIC ACCOMMODATIONS Statutory Enforcement—Connecticut

Public Act No. 111 of the 1959 Connecticut General Assembly, approved May 12, 1959, repeals a statute authorizing the state civil rights commission to initiate a complaint when it has reason to believe that the statute prohibiting deprivations of a person's constitutional rights because of race, creed, or color has been or is being violated in any public housing project or publicly assisted housing, and substitutes therefor language authorizing such action when the commission has reason to believe the Public Accommodations Statute has been or is being violated. The substituted Act appears below with deleted matters in brackets and new matters in italics.

AN ACT to permit the Civil Rights Commission to initiate complaints for violations of the Public Accommodation Statute.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 53-36 of the general statutes is repealed and the following is substituted in lieu thereof: In addition to the penalties provided for violation of sections 53-34 and 53-35 any person claiming to be aggrieved by a violation of either section may, by himself or his attorney, make, sign and file with the civil rights commission a complaint in writing under oath which shall state the circumstances of such violation and the

particulars thereof and shall contain such other information as may be required by the commission. In addition, the commission, whenever it has reason to believe that section [53-34] 53-35 has been or is being violated [in any public housing project or publicly assisted housing,] may issue a complaint. The commission may thereupon proceed upon such complaint in the same manner and with the same powers as provided in chapter 563 in the case of unfair employment practices, and the provisions of said chapter as to the powers, duties and rights of the commission, the complainant, the court, the attorney general and the respondent shall apply to any proceeding under the provisions of this section.

PUBLIC ACCOMMODATIONS

General—Maine

Public Law Chapter 282 (H.P. 560—L.D. 846) of the 1959 Maine Legislature, approved May 8, 1959, defines places of public accommodation and makes it unlawful for owners, operators, agents or employees thereof to discriminate by reason of race, color, religious creed, ancestry, or national origin.

AN ACT Relating to Discrimination at Places of Public Resort or Amusement.

Be it enacted by the People of the State of Maine, as follows:

R.S., c. 137, § 50, repealed and replaced. Section 50 of chapter 137 of the Revised Statutes is repealed and the following enacted in place thereof:

'Sec. 50. Discrimination by reason of race, color, religious creed, ancestry or national origin at places of public accommodation. No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement shall directly or indirectly by himself or another, refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or directly or indirectly, by himself or another, publish, issue, circulate, distribute or display in any way, any advertisement, circular, folder, letter, book, pamphlet, written or painted or printed notice or sign, of any kind or description, intended to discriminate against or actually discriminating against persons of any race, color, religious sect, creed, class, denomination, ancestry or national origin, in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such places of public accommodation, resort or amuse-

ment. The production of any such advertisement, circular, folder, letter, book, pamphlet, written or painted or printed notice or sign, purporting to relate to any such place and to be made by any person being the owner, or operator or an agent or employee of said owner or operator shall be presumptive evidence in any action that the same was authorized by such person.

A place of public accommodation, resort or amusement within the meaning of this section shall be deemed to include any establishment which caters or offers its services, facilities or goods to, or solicits patronage from the members of the general public, including but not limited to any inn, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barber shop, theater, music hall and any retail store.

Any person who shall violate any of this section or who shall aid in or incite, cause or bring about, in whole or in part, the violation of this section shall, for the first such offense, be punished by a fine of not more than \$100, or by imprisonment for not more than 30 days, or by both; and for each and every additional violation be punished by a fine of \$500, or imprisonment for not more than 30 days, or by both.'

PUBLIC DISTURBANCES

Private Property—Arkansas

Act 226 of the 1959 Session of the Arkansas General Assembly, approved by the Governor on March 25, 1959, makes it unlawful to create a "disturbance, or a breach of the peace, in any way whatsoever . . ." in any public place of business or other public place, and provides penalties.

AN ACT to Prohibit Any Person From Creating a Disturbance or Breach of the Peace in Any Public Place of Business, and to Prescribe the Penalty Therefor.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Arkansas, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate, or any other conduct which causes a disturbance or

breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six months, or both such fine and imprisonment.

Section 2. It has been found and is declared by the General Assembly of the State of Arkansas that there is an urgent need to provide a more effective method for preserving the public peace in the State, and that enactment of this bill will provide for a more efficient method. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

ADMINISTRATIVE AGENCIES

EDUCATION

Public Schools—Arkansas

The Little Rock, Arkansas, School Board at its meeting of July 14, 1959, adopted a statement requesting Governor Faubus to communicate to it a plan he was rumored to have for operating city high schools legally on a totally segregated basis, and reiterating its intention, in the absence of a plan by the governor, to open such schools with the use of the 1959 Public Assignment Law [See 4 Race Rel. L. Rep. 747, *supra*]. On July 28, 1959, Governor Faubus sent a letter to the President of the Little Rock School Board, suggesting a plan whereunder the Board would request that parents who wish, or would allow, their children to attend integrated schools, to so state, after which the Board would assign half each of the white students and the Negro students available for integration to the previously all-Negro Horace Mann High School and half each to the previously all-white Hall High School. The Governor further suggested that the division be made by sending all boys to one integrated school and all girls to the other. The remaining high schools would be left for those unwilling to accept integration. As an alternative in the event that only a few white parents volunteer for the suggested plan, the Governor proposed that the white children available for integration be assigned to Horace Mann High School. An extract from the minutes of the Board's July 14 meeting and the Governor's letter in response are reproduced below.

XI. STATEMENT LITTLE ROCK SCHOOL BOARD

Recent news releases in Little Rock newspapers have quoted Governor Faubus as intimating that he possibly has a plan whereby the Little Rock high schools may be operated legally on a totally segregated basis. The Little Rock Board of Education has been advised by our attorneys that any attempt to operate the Little Rock high schools on a compulsory segregated basis would place us in contempt of the Federal courts. They have further advised us that they know of no legal method whereby we can operate the high schools on a compulsory segregated basis.

Each and every member of the Little Rock Board of Education, if given a choice, would operate our schools completely segregated. However, if no choice is offered, we will not abandon free public education in order to avoid desegregation. To date neither Governor Faubus nor anyone else has come forward with any method whereby we may maintain compulsory segregation and still operate our public high schools. If Governor Faubus and his attorneys have con-

ceived of such a plan, we earnestly request that he communicate such plan to us immediately. We stand ready at all times to confer with him on this matter. On the contrary, if no such plan exists, then the sole remaining choice of this Board is to proceed with our previously announced plan to open our high schools with the use of the Pupil Assignment Law, Act No. 461, of the 1959 General Assembly, which law was approved and signed by Governor Faubus.

The Little Rock Board of Education welcomes the cooperation of Governor Faubus and all citizens in opening our schools peacefully.

STATE OF ARKANSAS
OFFICE OF THE GOVERNOR
LITTLE ROCK

July 28, 1959

Mr. Everett Tucker, President
Little Rock School Board
Little Rock, Arkansas

Dear Mr. President:

Although I have received no communication of any nature whatsoever from the Little Rock

School Board, I have noted from the press that the board, by a majority vote on a resolution, has challenged me to present any suggestion that I might have for a solution to the current segregation-integration controversy in the city. I do have definite and specific suggestions to make, and I am adopting this means of conveying these suggestions to you. However, in order to avoid any misunderstanding of my position, I am prefacing my suggestions with the following remarks.

Those who advocate the forcible integration of the schools on the theory that it is the "law of the land" have a very weak case, indeed. A citizen is bound no less by the laws of his own state than by the federal law.

Our State Constitution provides as follows:

"AMENDMENT No. 44

Section 1. From and after the Adoption of this Amendment, the General Assembly of the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegregation decisions of May 17, 1954, and May 31, 1955 of the United States Supreme Court. . . .

. Said opposition shall continue steadfast until such time as such Un-Constitutional invasions or encroachments shall have abated or shall have been rectified. . . ."

This is the language of the 44th Amendment to our state Constitution, an amendment which was initiated by petition of the people, and adopted as a part of our state Constitution by a large majority vote of the people at the general election in November, 1956.

This amendment to our Constitution has not yet been challenged in any court, and, therefore, stands today as the law of our state by the unquestioned will of our people.

Pursuant to this constitutional mandate from the people, the General Assembly enacted and I approved early in 1959, Act 236, which reads in part as follows:

"WHEREAS, the Supreme Court of the United States predicated its school integration decision upon the psychological effect of segregated classes upon children of the Negro race, and, at the same time, ignored the psychological impact of integrated schools upon certain white children who observe segregation of the races as a way of life; and

"WHEREAS, legislation is necessary in order to protect the health, welfare, well-being, and educational opportunities of such white children; NOW THEREFORE

"Be It Enacted By The General Assembly Of The State Of Arkansas:

"SECTION 1. No person eligible to attend public schools shall be required to attend a school with students of another or different race in order to exercise his right under the Constitution of this State to receive gratuitous instruction."

I attach great significance to the fact that as arrogant as the NAACP may be, it has not had the affrontry to attack the validity of this statute under the Constitution, of our state or our nation. It is quite apparent that the agitators in this group and other integrationists realize that any attack on this statute will raise a question of fact that they cannot successfully meet, and I refer to the "psychological impact of integrated schools upon White children who observe segregation of the races as a way of life."

Also, we have our Federal Constitution, and the Tenth Amendment thereto clearly states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

Among these powers—the powers not delegated to the federal government, nor prohibited by it to the states, and reserved to the states, or to the people—is the complete and unfettered power of each state to control the public schools within its borders.

This amendment still stands and has not been repealed or modified by any subsequently adopted amendment to the Federal Constitution.

On the other hand, we have only a decision of the United States Supreme Court, based almost wholly upon theories of sociology and psychology found in certain books on such subjects, the principal author being Gunnar Myrdal, a Swedish Socialist. There was the merest passing mention of the 14th Amendment to the Federal Constitution in the opinion filed by the court.

Of the "law of the land" theory based on this decision, former Congressman Samuel B. Pettengill of Indiana recently wrote:

"But more important than integration or

segregation is the preservation of the Constitution against the brainwashing of the American people now going on, to support the curious notion that a decision of the U. S. Supreme Court—any decision—is 'law'."

It seems to me that it should be plain to any local, district, or state official as to which of the above more clearly reflects the will of the people of Arkansas, and which should be more binding upon him in his responsibilities as a public official.

It is plain to anyone that the great majority of the people of Arkansas prefer segregated schools, and they have that right under the Federal Constitution and the laws of the state.

Even so, it has been clearly demonstrated that the people of Arkansas will accept the freedom of choice, on a community basis, of either segregated or integrated schools. This is amply evidenced by the non-interference with the operation of integrated schools at Charleston, Fayetteville, and other places in our state.

In a large school district such as Little Rock, where the problem is more complex and difficult of solution, I believe the people would accept a plan of school operation based upon an individual choice between segregated or integrated schools.

This brings me to my first suggestion—a plan which I believe will come most closely to winning acceptance, and, thereby, bring about peaceful integration in the Little Rock schools.

I suggest that the school board ask all the parents who wish their children to attend the integrated schools, or who will allow their children to attend integrated schools without undue objection, to come forward and so state.

After you have determined the number of students available for integration, as evidenced by the voluntary actions of their parents, assign half the White students to Horace Mann High School and half to Hall High School. Do the same with the Negro students. There would then exist two integrated schools, leaving the other facilities available for those students whose parents are unwilling to accept integration.

I predicate this suggestion on the following:

(1) It is clear that a majority of White parents do not desire integration (see vote results for special election of September, 1958). Central High School has approximately three times the capacity of Hall or Horace Mann, thus meeting the requirement

for more space for those desiring segregated schools.

(2) The facilities of Hall and Horace Mann are located in the areas where it has been clearly indicated that the most sentiment exists for the acceptance of integrated public schools.

(3) This will make available the newest and most modern facilities for the use of integrated schools, and will eliminate any possible complaint about the facilities of integrated schools. I believe those who observe segregation of the races as a way of life will be willing to accept the less modern, and, in some respects, inferior facilities at Central, in order to preserve their way of life.

I suggest further, to forestall the inevitable increase of moral problems which have always come with integrated schools, that the board send all boys to one school and all girls to the other.

Transportation will be no problem, because of the short distances involved; and, if necessary to use buses, the same vehicles can carry students both ways. In any plan of integration, the board will eventually face this problem. In New York, Philadelphia, and other integrated cities, students have been transported from the very door of one school to facilities miles distant, in order to bring about mixed schools in true ratio to racial numbers in the population of the whole area. Therefore, there can be no valid objections to the plan because of transportation difficulties.

As an alternative, in the event a substantial number of White parents do not volunteer for this plan, the children of the small number who do volunteer may be assigned to Horace Mann High School with the Negro students. It would then be unnecessary to assign any Negro student to any other school. All Negro students would be attending an integrated school. In the language of the U. S. Supreme Court, no Negro "would be separated from others of similar age and qualifications solely because of their race (which) generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

No sincere integrationist can object to this plan—either to the integration of both Hall and Horace Mann, or to the integration of Horace

Mann alone. They would be practicing what they preach—they would be demonstrating a live faith. For does not the Scripture teach that "faith without works is dead."

Any sincere integrationist must be willing to accept this plan, because it will afford an integrated status in the public schools for Negro students, and will avoid for Negro students the segregated status which, in the language of the U. S. Supreme Court, "has a detrimental effect upon the Colored students."

This plan will not affect adversely any sincere segregationist in his immediate concern for his children. It allows full freedom of choice for all those of either viewpoint.

Such a plan will also afford a wonderful opportunity for sincere integrationists of both races to demonstrate to all by action and concrete evidence, whether or not any good can come from the integration of the races in the public schools. They should welcome the opportunity to show their faith in their viewpoint.

In the words of the great American Jurist, Mr. Holmes, in one of his famous opinions, it will be an opportunity to set forth the fundamental truth—"that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."

I believe that the acceptance of this plan by the school board and the integrationists of Little Rock will bring about an immediate solution to this grave problem. Fear, uneasiness, and animosity should rapidly subside. With friction removed, the propaganda wars, boycotts, and counter-boycotts would almost immediately be forgotten. We would have reason to hope that the gulf of distrust and hatred which has been created between the races by the arrogance of the NAACP and the "police-state" methods of the federal government would begin to fade away.

I am convinced that any plan of integration—token, limited, or otherwise—which is evolved

from the pupil assignment plan, or any other plan, which forces parents to send their children to integrated schools against their will, will have the opposite effect on the feelings and sentiments of the people.

Your public statements indicate that the school board intends to make use of our school assignment laws. The plan I have outlined can be executed within the framework of these two school assignment laws. I know that this plan is in keeping with the spirit and the letter of Amendment 44 to our State Constitution, and Act 236, both of which, I reiterate, stand unchallenged by the integrationists.

Adoption of this plan—the voluntary integration of some schools, leaving a freedom of choice for all—could result in a permanent solution of this problem in Little Rock. The same plan could be carried step by step through all other grades in the public schools.

These suggestions do not indicate in any way any change in my attitude in opposition to the usurpation of the people's rights or the state's powers by the federal government. I have all along recognized the right of voluntary association. I have opposed and will continue to oppose association by compulsion. I will continue to defend the right of the state and its communities to control the locally and state-supported educational institutions. I hope the time will soon come when the federal authorities will cease the illegal usurpation of state and local rights, thus relieving you and me, and the people, of burdens which are unnecessary—burdens cast upon us by a U. S. Supreme Court that has no respect for established precedent—a court that has earned (by its disregard of our constitutional rights) a growing disrespect of the people of our nation.

Respectfully

Orval E. Faubus
Governor

dlh

cc: Each School Board Member.

EDUCATION**Public Schools—North Carolina**

The Board of Education of Craven County, North Carolina, on July 13, 1959, by resolution stated a willingness to co-operate with authorities of the Marine Corps Air Station at Cherry Point "to provide appropriate relief" for "hardship cases" resulting from the assignment of children of Negro military personnel to schools 18-20 miles distant; commended the District School Committee adjacent to the station for recognizing the desirability of having such children attend its previously white schools, provided they "meet the reasonable requirements to be specified" by the District Principal and local School Committee, and specified procedures for assignment and admission.

RESOLUTION

WHEREAS, the schools of the Havelock District have been constructed to serve the eligible children of personnel attached to the Marine Corps Air Station at Cherry Point; and

WHEREAS, it has been necessary heretofore to transport some children of the personnel of the Air Station to schools a distance of eighteen to twenty miles from the Air Station; and

WHEREAS, the difficulties arising from such transportation have created hardships for some of the parents, resulting in instances in their requesting transfers from the Air Station; and

WHEREAS, the District School Committee of the Havelock School District has made it known to the Craven County Board of Education that it is desirable that beginning with the Fall Term of 1959 dependent children of military personnel stationed at the Marine Corps Air Station at Cherry Point and living in government quarters, should be permitted to attend the Havelock Elementary Schools, namely, the Havelock Elementary School and the Graham Barden Elementary School, subject to the qualification of such children to meet the reasonable requirements to be specified by the District Principal and the Local School Committee;

THEREFORE BE IT RESOLVED by the Craven County Board of Education in session on Monday, July 13, 1959:

First, that the Craven County Board of Education recognizes the organizational difficulties confronting the military authorities at Cherry Point; and

Second, that it expresses a willingness and desire to cooperate with said military authorities to provide appropriate relief for such hardship cases that result from assignment of certain children of military personnel to schools eighteen to twenty miles distant from the Air Station; and

Third, that the Craven County Board of Education commends the Havelock District School Committee for their forthright effort to meet the necessities of the Havelock situation; and

Fourth, that the Craven County Board of Education finds that the difficulties pointed out by the Havelock District School Committee should be reasonably met, and it hereby approves the action to meet the same, with the following additional and supplementary provisions to be appended thereto:

(1) Admission of each student shall be predicated upon an individual written application upon forms provided by the School Authorities for a determination as to eligibility of the applicant.

(2) Acceptance and placement of each applicant found to be eligible shall be made by the Craven County Board of Education which shall in considering such finding, first be applied by the Havelock District Principal and the Havelock District School Committee with his and their recommendation as to each applicant, such recommendation to be submitted to the Craven County Board of Education for consideration with the application of each pupil for assignment, and such assignment shall be made only upon the final approval of the Craven County Board of Education.

EDUCATION

Public Schools—Virginia (Prince Edward County)

The Board of Supervisors of Prince Edward County on June 2, 1959, resolved not to levy any taxes for the year 1959-1960 "for either the operation of Public Schools or for Educational Purposes." [For previous developments concerning Prince Edward County, see 1 Race Rel. L. Rep. 5 (1954); 1 Race Rel. L. Rep. 11, 82 (1955); 1 Race Rel. L. Rep. 1055 (1956); 2 Race Rel. L. Rep. 341, 1119 (1957); 3 Race Rel. L. Rep. 964 (1958); and 4 Race Rel. L. Rep. 256 (1959)].

In re: Levy for Public School Purposes:

On motion of Mr. Vaughan, which was seconded by Mr. Steck and carried unanimously, the following resolution was adopted:

Be it resolved, by the Board of Supervisors of Prince Edward County, Virginia, that the

Board will not levy any taxes for the year 1959-1960 for either the operation of Public Schools or for Educational Purposes and the Budget Committee heretofore appointed is requested to submit its report to the Board at 4 P. M., June 3, 1959, and this meeting is adjourned until that time.

CIVIL RIGHTS

Commission Report—Federal

Under provisions of Public Law 85-315 (2 Race Rel. L. Rep. 1011), the United States Civil Rights Commission was directed to investigate allegations of the deprivation of voting rights, to study and collect information concerning legal developments constituting a denial of equal protection of the laws, and to appraise the laws and policies of the federal government with respect to equal protection of the laws. On September 9, 1959, the commission submitted its report to the President and to the Congress. Included were separate chapters setting forth findings and recommendations in the fields of voting, education, and housing. These are reproduced below:

Voting

The Problem

"To secure these rights," declared the great charter of American liberty, "governments are instituted among men, deriving their just powers from the consent of the governed." The instrument by which consent is given or withheld is the ballot.

Few Americans would deny, at least in theory, the right of all qualified citizens to vote. A significant number, however, differ as to which citizens are qualified. None in good conscience can state that the goal of universal adult suffrage has been achieved. Many Americans, even today, are

denied the franchise because of race. This is accomplished through the creation of legal impediments, administrative obstacles, and positive discouragement engendered by fears of economic reprisal and physical harm. With those Americans who of their own volition are too apathetic either to register or, once registered, too apathetic to vote, this report does not concern itself. But with denials of the right to vote because of race, color, religion, or national origin, this Commission and the Congress of the United States are urgently concerned.

The Commission's studies reveal that many Negroes are eager to exercise their political

rights as free Americans and that they have made some progress. Our investigations have revealed further that many Negro American citizens find it difficult, and often impossible, to vote. An attempt has been made to gather and assess statistics and facts regarding denial of the right to vote. This task has required careful analysis and understanding of the legal impediments.

The Commission has sought to evaluate the extent to which there is an obligation on the part of the Federal Government to prevent denial of the right to vote because of discrimination by reason of color, race, religion, or national origin. This is what Congress asked. The scope of Federal power to protect the suffrage depends on whether interference comes from State and local officers or from private persons; on whether improper voting procedure alone is involved, or whether the interference is based on race or color, and on the nature of the election itself, whether State or national.

Article I, section 2, of the U.S. Constitution has long stood for the proposition that while the qualifications of electors of Members of Congress are governed by State law, the right to vote for such representatives is derived from the U.S. Constitution. Article I, section 4, authorizes Federal protection of voting in Federal elections against interference from any source. The Fourteenth Amendment affords protection against State interference with the equality of opportunity to vote in any election. The Fifteenth Amendment prohibits any action by the United States or a State, in any election, which interferes with the right to vote because of race or color or previous condition of servitude. The Seventeenth Amendment provides that a person possessing State qualifications has a right to vote which is derived not merely from the constitution or the laws of the state from which the Senator is chosen, but has its foundation in the Constitution of the United States. The Nineteenth Amendment supports action in any election against State interference with the right to vote because of sex.

On many occasions our nation has found it necessary to review the state of the civil rights of its people. During the period 1776 through 1791 civil rights were of prime concern in the drafting of the Declaration of Independence, the writing of the Constitution and the Bill of Rights. A new concept of liberty emerged. It

was almost immediately challenged by the Alien and Sedition Acts of 1798. Then, prior to, during, and after the War Between the States an appraisal of civil rights culminated in the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments. The most recent review prior to 1957 was initiated by Executive Order 9808 promulgated by President Harry S. Truman on December 5, 1946, establishing the President's Committee on Civil Rights. This culminated in the 1947 report of the Committee entitled *To Secure These Rights*. Many recommendations were made in the voting field. Twelve years have passed since that report was issued. Without attempting to evaluate specific changes other than those reflected in the body of our report on voting, it has become apparent that legislation presently on the books is inadequate to assure that all our qualified citizens shall enjoy the right to vote. There exists here a striking gap between our principles and our everyday practices. This is a moral gap. It spills over into and vitiates other areas of our society. It runs counter to our traditional concepts of fair play. It is a partial repudiation of our faith in the democratic system. It undermines the moral suasion of our national stand in international affairs. It reduces the productivity of our nation. In the belief that new legislation is needed, we submit for consideration of the President and the Congress the following recommendations which we believe will help Americans to make good our declarations of national purpose.

Registration and Voting Statistics

Background

The Commission study of voting revealed that information on voting turnout in the United States is incomplete. Data on voting turnout among specific racial groups, particularly on a comparative basis for States or sections, was impossible to obtain except for fragmentary material provided by the Survey Research Center of the University of Michigan, Elmo Roper and Associates, and the Gallup Organization. Official State sources are of only limited help. Some States report total registration figures, in some cases broken down by counties. Other States do not report such figures. To know the extent of nonvoting requires a standard, and the one usually adopted is the potential vote,

that is, the total number of citizens of voting age. This is an inexact standard because, in any year, millions of citizens are ineligible to vote because of State residence and other requirements. If it were possible to have reliable registration figures, State by State and county by county, the computation of voting turnout among those qualified to vote would be simple. Millions of citizens are eligible to register but neglect to do so and their number can be more accurately estimated if reliable registration figures are available.

Findings

The Commission finds that there is a general deficiency of information pertinent to the phenomenon of nonvoting. There is a general lack of reliable information on voting according to race, color, or national origin, and there is no single repository of the fragmentary information available. The lack of this kind of information presents real difficulties in any undertaking such as this Commission's.

Recommendation No. 1.

Therefore, the Commission recommends that the Bureau of the Census be authorized and directed to undertake, in connection with the census of 1960 or at the earliest possible time thereafter, a nation-wide and territorial compilation of registration and voting statistics which shall include a count of individuals by race, color, and national origin who are registered, and a determination of the extent to which such individuals have voted since the prior decennial census.¹

Availability of Voting Records

Background

In its effort to discharge its duty to "investigate" formal complaints of denial of the right to vote by reason of race and color, the Commission found it necessary to examine the registration and voting records kept by local officials pursuant to provisions of State law. In both

Alabama and Louisiana, the two States which led in the number of voting complaints received by the Commission, the Commission and its staff encountered obstacles in its effort to examine records. These obstacles were erected upon existing State laws, or interpretations thereof, by State officials; they were at least partially effective as a deterrent to the Commission's discharge of its duty.

Specifically, officials of the State of Alabama interpreted constitutional provisions vesting adjudicatory powers in boards of registrars to pass upon applications as precluding examination thereof by a nonjudicial body of the Federal Government. This interpretation was held to be without merit by the Federal courts. Alabama officials further interpreted custodial and repository provisions of State law as precluding production of the records at the Commission's hearing. By compromise agreement, some of the records were examined by the Commission staff after the hearing.

Officials of the State of Louisiana interpreted provisions for examination of the State registration and voting records as prohibiting such examination by the Commission staff. This interpretation, similar to the Alabama refusal, necessitated exercise of the Commission's subpoena power, and unnecessarily delayed the Commission's efforts to evaluate the merits of the complaints in both States.

Furthermore, after records in only one-half of the counties being investigated in Alabama had been examined, the State legislature passed a bill which permits the destruction of application forms of persons denied registration. Such forms are essential to any investigation of denials of the right to vote.

Findings

The Commission finds that lack of uniform provision for the preservation and public inspection of all records pertaining to registration and voting hampers and impedes investigation of alleged denials of the right to vote by reason of race, color, religion, or national origin.

Recommendation No. 2

Therefore, the Commission recommends that the Congress require that all State and Territorial registration and voting records shall be public records and must be preserved for a period of 5 years, during which time they shall

1. The 1960 decennial census forms were "frozen" in December 1958, and are already being printed. The Commission urges the Congress to consider the feasibility of a supplementary census for the collection of these urgently-needed voting statistics.

be subject to public inspection, provided that all care be taken to preserve the secrecy of the ballot.

Evasion of Registration Responsibilities

Background

Complaints were frequently made that State officials charged with responsibility to register qualified persons as electors evaded this responsibility, in the case of persons of a particular race or color, by inaction. Such practices are beyond the effective reach of the present remedial provisions of the Civil Rights Act of 1957.

Specifically, the Commission found that boards of registrars in both Bullock and Macon Counties in Alabama frequently did not function as boards to register Negro applicants on scheduled dates for registration. Furthermore, in these same two counties, on several different occasions, one or more members of such boards—always in sufficient numbers to preclude the existence of the "majority" required for approval of registration—resigned their posts. And further, State officials responsible for appointing members of boards of registrars repeatedly have delayed such appointments when boards became inoperative through resignation.

Findings

The Commission finds that the lack of an affirmative duty to constitute boards of registrars, or failure to discharge or enforce such duty under State law, and the failure of such boards to function on particular occasion or for long periods of time, or to restrict periods of function to such limited periods of time as to make it impossible for most citizens to register, are devices by which the right to vote is denied to citizens of the United States by reason of their race or color. It further finds that such failure to act is arbitrary, capricious, and without legal cause or justification.

Recommendation No. 3

Therefore, the Commission recommends that part IV of the Civil Rights Act of 1957 (42 U.S.C. 1971) shall be amended by insertion of the following paragraph after the first paragraph in section 1971(b):

Nor shall any person or group of persons, under color of State law, arbitrarily and without legal justification or cause, act, or being under duty to act, fail to act, in such manner as to deprive or threaten to deprive any individual or group of individuals of the opportunity to register, vote and have that vote counted for any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegate or Commissioner for the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

Refusal of Witnesses To Testify

Background

In the course of conducting voting hearings in Montgomery, Ala., in December 1958, the Commission was impressed with the fact that its purposes were not fully realized because of the divided authority for compelling the production of registration records. The Commission can subpoena such records but the initiative rests with the Attorney General to petition the court to order a contumacious witness to comply with a Commission subpoena. Such divided responsibility is unusual. These situations require rapid, coordinated action and communication. Both are difficult to achieve when there is dual responsibility and operation.

Findings

The Commission finds that the necessity for securing the aid and cooperation of a separate agency of the Federal Government in order to discharge the Commission's responsibilities under law is a needlessly cumbersome procedure. It is not a sound system of administration. Full and effective implementation of Commission policy in the discharge of Commission responsibilities under law requires full and exclusive control of any necessary resort to the courts by the Commission itself.

Recommendation No. 4

Therefore, the Commission recommends that in cases of contumacy or refusal to obey a sub-

pena issued by the Commission on Civil Rights (under sec. 105(f) of the Civil Rights Act of 1957) for the attendance and testimony of witnesses or the production of written or other matter, the Commission should be empowered to apply directly to the appropriate U.S. district court for an order enforcing such subpoena.

Appointment of Temporary Federal Registrars

Background

The Commission has investigated sworn complaints of denials of the right to vote by reason of color or race in seven States. In two States where it determined to hold formal hearings, Alabama and Louisiana, its efforts to secure all relevant facts were met with open resistance by State officials. Nevertheless, on the basis of the testimony of witnesses and the examination of the registration records that were made available in Alabama, and through field investigation in other States, the Commission found that a substantial number of Negroes are being denied their right to vote. The infringement of this right is usually accomplished through discriminatory application and administration of State registration laws.

But discriminatory registration is not the only problem. The Commission also found instances in which there was no registration board in existence, or none capable of functioning lawfully. In all such cases, the majority of the electorate already registered were white persons.

For one example, the members of the Macon County, Alabama Board of Registrars, resigned after this Commission's Alabama hearing. At the hearing, 25 Macon County Negroes had testified that the Board had unlawfully refused to register them. Invited to answer these charges, the Macon County registrars had refused to testify. But an injunction suit against the Board to compel registration of 17 of the hearing witnesses and other apparently qualified Negroes, brought by the U.S. Attorney General under the new provisions of the Civil Rights Act of 1957, was dismissed for lack of anyone to sue. Subsequently, new appointees to the Macon County Board were named in July 1959. They refused to serve. Their reason, according to a United Press International report, was "the pressure for Negro registration" and "fear of being 'hounded' by the United States Civil Rights Commission."

The two other suits brought by the Attorney General under the same Act had not at this writing resulted in a single registration. The suit in Georgia had been dismissed and was on appeal; the one in Louisiana was pending.

In short, no one had yet been registered through the civil remedies of the 1957 act.

Class suits on behalf of a number of Negroes to obtain registration have rarely been successful. The courts have inclined to the view that these suits are of an individual nature, with the result that a vast number of suits may be necessary.

The delays inherent in litigation, and the real possibility that in the end litigation will prove fruitless because the registrars have resigned make necessary further remedial action by Congress if many qualified citizens are not to be denied their constitutional right to vote in the 1960 elections.

Findings

The Commission finds that substantial numbers of citizens qualified to vote under State registration and election laws are being denied the right to register, and thus the right to vote, by reason of their race or color. It finds that the existing remedies under the Civil Rights Act of 1957 are insufficient to secure and protect the right to vote of such citizens. It further finds that some direct procedure for temporary Federal registration for Federal elections is required if these citizens are not to be denied their right to register and vote in the forthcoming national elections. Some method must be found by which a Federal officer is empowered to register voters for Federal elections who are qualified under State registration laws but are otherwise unable to register.

Such a temporary Federal registrar should serve only until local officials are prepared to register voters without discrimination. The temporary Federal registrar should be an individual located in the area involved, such as the Postmaster, U. S. Attorney, or Clerk of the Federal District Court. The fact-finding responsibilities to determine whether reasonable grounds exist to believe that the right to vote is being denied could be discharged by the Commission on Civil Rights, if extended. Because of the importance of the matter, such a temporary Federal registrar should be appointed directly by the President of the United States.

Recommendation No. 5

Therefore, the Commission recommends that, upon receipt by the President of the United States of sworn affidavits by nine or more individuals from any district, county, parish, or other political subdivision of a State, alleging that the affiants have unsuccessfully attempted to register with the duly constituted State registration office, and that the affiants believe themselves qualified under State law to be electors, but have been denied the right to register because of race, color, religion or national origin, the President shall refer such affidavits to the Commission on Civil Rights, if extended.

A. The Commission shall:

1. Investigate the validity of the allegations.
2. Dismiss such affidavits as prove, on investigation, to be unfounded.
3. Certify any and all well-founded affidavits to the President and to such temporary registrar as he may designate.

B. The President upon such certification shall designate an existing Federal officer or employee in the area from which complaints are received, to act as a temporary registrar.

C. Such registrar-designate shall administer the State qualification laws and issue to all individuals found qualified, registration certificates which shall entitle them to vote for any candidate for the Federal offices of President, Vice President, presidential elector, Members of the Senate or Members of the House of Representatives, Delegates or Commissioners for the Territories or possessions, in any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

D. The registrar-designate shall certify to the responsible State registration officials the names and fact of registration of all persons registered by him. Such certification shall permit all such registrants to participate in Federal elections previously enumerated.

E. Jurisdiction shall be retained until such time as the President determines that the presence of the appointed registrar is no longer necessary.

Dissent by Commissioner Battle

I concur in the proposition that all properly qualified American citizens should have the right to vote but I believe the present laws are sufficient to protect that right and I disagree with the proposal for the appointment of a Federal Registrar which would place in the hands of the Federal Government a vital part of the election process so jealously guarded and carefully reserved to the States by the founding fathers.

Proposed Amendment**Proposal for a Constitutional Amendment to Establish Universal Suffrage**

By Chairman Hannah and Commissioners Heshburgh and Johnson

The Commission's recommendation for temporary Federal registration should, if enacted by Congress, secure the right to vote in the forthcoming national elections for many qualified citizens who would otherwise, because of their race or color, be denied this most fundamental of American civil rights. But the proposed measure is clearly a stopgap.

In its investigations, hearings and studies the Commission has seen that complex voter qualification laws, including tests of literacy, education and "interpretation," have been used and may readily be used arbitrarily to deny the right to vote to citizens of the United States.

Most denials of the right to vote are in fact accomplished through the discriminatory application and administration of such State laws. The difficulty of proving discrimination in any particular case is considerable. It appears to be impossible to enforce an impartial administration of the literacy tests now in force in some States, for where there is a will to discriminate, these tests provide the way.

Therefore, as the best ultimate solution of the problem of securing and protecting the right to vote, we propose a constitutional amendment to establish a free and universal franchise throughout the United States.

An important aim of this amendment would be to remove the occasion for further direct Federal intervention in the States' administration and conduct of elections, by prohibiting complex voting requirements and providing clear, simple and easily enforceable standards.

The proposed constitutional amendment would give the right to vote to every citizen who meets his State's age and residence requirements and who is not legally confined at the time of registration or election.

Age and residence are objective and simple standards. With only such readily ascertainable standards to be met, the present civil remedies of the Civil Rights Act should prove more effective in any future cases of discriminatory application. A court injunction could require the immediate registration of any person who meets these clear-cut State qualifications.

The proposed amendment is in harmony with the American tradition and with the trend in the whole democratic world. As noted in the beginning of this section of the Commission's report, the growth of American democracy has been marked by a steady expansion of the franchise; first by the abandonment of property qualifications and then by conferral of suffrage upon the two great disfranchised groups, Negroes and women. Only 19 States now require that voters demonstrate their literacy. Michigan, New Hampshire, Pennsylvania, Tennessee, and Vermont have suffered no apparent harm from absence of the common provisions disqualifying mental incompetents. With minor exceptions, mostly involving election offenses, Colorado, Maine, Massachusetts, Michigan, Pennsylvania, Utah, Vermont, and West Virginia have no provisions barring certain ex-convicts from the vote, and of the States which do have such provisions, all but eight also provide for restoration of the former felon's civil rights. In only five States is the payment of a poll tax still a condition upon the suffrage.

The number of Americans disqualified under each of these categories is very small compared with the approximately 90 million now normally qualified to vote. It is also small in relation to the numbers of qualified nonwhite citizens presently being disfranchised by the discriminatory application of these complex laws. The march of education has almost eliminated illiteracy. In a nation dedicated to the full development of every citizen's human potential, there is no excuse for whatever illiteracy that may remain. Ratification of the proposed amendment would, we believe, provide an additional incentive for its total elimination. Meanwhile, abundant information about political candidates and

issues is available to all by way of television and radio.

We believe that the time has come for the United States to take the last of its many steps toward free and universal suffrage. The ratification of this amendment would be a reaffirmation of our faith in the principles upon which this nation was founded. It would reassure lovers of freedom throughout a world in which hundreds of millions of people, most of them colored, are becoming free and are hesitating between alternative paths of national development.

For all these reasons we propose the following Twenty-third Amendment to the Constitution of the United States.

ARTICLE XXIII SECTION 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State or by any person for any cause except inability to meet State age or length-of-residence requirements uniformly applied to all persons within the State, or legal confinement at the time of registration or election. This right to vote shall include the right to register or otherwise qualify to vote, and to have one's vote counted.

SECTION 2

The Congress shall have power to enforce this article by appropriate legislation.

Separate Statement Regarding Proposed XXIII Amendment

By Vice Chairman Storey and Commissioner Carlton

We strongly believe in the right of every qualified citizen of the United States, irrespective of his color, race, religion, or national origin, to register, vote, and have his vote counted. We regard full protection of these rights of suffrage by both State and Federal Governments necessary and proper. Therefore, we have supported and voted for all recommendations of the Commission (except the proposed XXIII Amendment) to strengthen the laws and improve the administration of registration and voting procedures. However, we cannot join our distinguished colleagues in the recommendation of the

proposed constitutional amendment. These are our several reasons:

1. We believe that our Commission recommendations, if enacted into law and properly enforced, will eliminate most if not all of the restrictions on registration and voting by reason of race, color, religion, or national origin.

A recommendation proposing a constitutional amendment granting additional power to the Federal Government would be in order only if we had found a lack of power under existing constitutional provisions. Such is not the case.

2. On principle, proposals for constitutional amendments which would alter long-standing Federal-State relationships, such as the constitutional provision that matters pertaining to the qualifications of electors shall be left to the several States, should not be proposed in the absence of clear proof that no other action will correct an existing evil. No such proof is apparent.

3. The Constitution of the United States of America presently includes sufficient authority to the Federal Government to enable it effectively to deal with denials of the right to vote by reason of race, color, religion, and national origin.

4. The information and findings cited in support of the proposed Twenty-third Amendment disclose that some illiteracy still exists, that authoritative State statistics and studies are wholly lacking to support such an important proposal, and that our staff has not had the opportunity to make a thorough study of such a far-reaching proposal.

. . .

I heartily agree with the objections of Commissioners Storey and Carlton to the proposed Constitutional Amendment.

John S. Battle, Commissioner

Public Education

The Problem

In 1954 the Supreme Court of the United States held that compulsory racial segregation in public schools is a denial of the equal protection of the laws under the Fourteenth Amendment to the United States Constitution, and of the due process of law required by the Fifth Amendment. In so holding, the Court did not require racial integration in the schools. What the Court did hold is that publicly supported schools must be opened to all races on a non-segregated basis.

The requirements of this declaration of constitutional principle have been stated clearly by the late Judge John J. Parker of the United States Court of Appeals for the 4th Circuit in the case of *Briggs v. Elliott*:

What it (the Supreme Court) has decided, and all that it has decided, is that a State may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the State may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of

different races voluntarily attend different schools, as they attend different churches (132 F.Supp. 776 (1955)).

The Commission based its study of legal developments constituting a denial of the equal protection of the laws in the field of public education upon two fundamental premises:

(1) The American system of public education must be preserved without impairment because an educated citizenry is the mainstay of the Republic and full educational opportunity for each and every citizen is America's major defense against the world threat to freedom.

(2) The constitutional right to be free from compulsory segregation in public education can be and must be realized, for this is a government of law, and the Constitution as interpreted by the Supreme Court is the supreme law of the land.

The problem, therefore, is how to comply with the Supreme Court decision while preserving and even improving public education. The ultimate choice of each State is between finding reasonable ways of ending compulsory segregation in its schools or abandoning its system of free public education.

Information, Advisory, Conciliation Services

Background

The Commission's studies, and particularly its conference with school officials from districts in border States and a few in the South that have in some measure desegregated since 1954, demonstrate that when local school officials are permitted to act responsibly in adopting plans that fit local conditions the difficulties of desegregation can be minimized. A variety of plans have proved to be successful, ranging from the merger of the former Negro and white school systems into one integrated system (particularly in communities where the Negro population was small and the cost of maintaining separate systems considerable) to the gradual Nashville plan that began in the first grade and is proceeding at the rate of one grade a year, with voluntary transfer permitted to any child assigned to a school where his race is in the minority.

In *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101 (1958) the United States Supreme Court upheld as valid on its face the Alabama pupil placement law on the assumption that the law would be administered in a constitutional manner. Eight Southern States have adopted pupil placement laws as a means of meeting the test of nondiscrimination. This is another possible method by which compliance may be achieved.

Standards Raised

In many instances desegregation has been used by the local community as the occasion to raise its educational standards. In many instances remedial programs have been adopted for the handicapped, and advanced programs established for gifted students. Such programs were described to the Commission at its Nashville conference by the superintendents from Wilmington, Del.; Washington, D.C.; and San Angelo, Tex. St. Louis, Mo., has adopted a similar program. It is important that any transition should not result in the lowering of educational standards for either the white or Negro student. If possible, it should result in an improvement of educational standards for both; a number of school officials report that this has already happened in their communities.

In the transition to a nondiscriminatory school system, a carefully developed State or local plan

is better than a plan imposed by a court for the immediate admission of certain litigants, or a plan imposed by any outside agency. The Supreme Court and the Federal lower courts have made it clear that they will consider sympathetically any reasonable plan proposed in good faith. This seems to be an area in which the principle of State's rights can most effectively express itself through local option in meeting this problem. If State governments do not permit local school officials to develop such plans for good faith compliance, the effectiveness of the school system in the State as a whole will be impaired. By permitting such local option a variety of methods of transition can be developed that take into account the varying circumstances in different areas of the State.

Findings

1. The ease of adjustment of a school system to desegregation is influenced by many factors including the relative size and location of the white and Negro population, the extent to which the Negro children are culturally handicapped, segregation practices in other areas of community life, the presence or absence of democratic participation in the planning of the program used or preparation of the community for its acceptance, and the character of the leadership in the community and State.

2. Many factors must be considered and weighed in determining what constitutes a prompt and reasonable start toward full compliance and the means by which and the rate at which desegregation should be accomplished.

3. Desegregation by court order has been notably more difficult than desegregation by voluntary action wherein the method and timing have been locally determined.

4. Many school districts in attempting to evolve a desegregation plan have had no established and qualified source to which to turn for information and advice. Furthermore, many of these districts have been confused and frustrated by apparent inconsistencies in decisions of lower Federal courts.

Recommendations No. 1(a) and 1(b)

Therefore, the Commission recommends: 1(a) That the President propose and the Congress enact legislation to authorize the Commission on Civil Rights, if extended, to serve as a clearing-

house to collect and make available to States and to local communities information concerning programs and procedures used by school districts to comply with the Supreme Court mandate either voluntarily or by court order, including data as to the known effects of the programs on the quality of education and the cost thereof.

1(b) That the Commission on Civil Rights be authorized to establish an advisory and conciliation service to assist local school officials in developing plans designed to meet constitutional requirements and local conditions; and to mediate and conciliate, upon request, disputes as to proposed plans and their implementation.

Annual School Census

Background

The primary problem of equal protection of the laws in the field of public education is desegregation of public school systems in which separate schools for white and Negro children have been maintained by compulsion of State law. The Commission's study of this problem necessarily required public school enrollment figures, by race of students and type of school attended, for all school districts in the 17 States and the District of Columbia where compulsory segregation had been the rule.

The Commission found that the United States Office of Education of the Department of Health, Education, and Welfare, which formerly collected and published such information, ceased doing so with the school year 1953-54. It was necessary, therefore, to secure such data directly from State and local officials or from secondary sources. As a matter of policy the keeping of records by race has been discontinued in the States of Kentucky, Missouri, Oklahoma, West Virginia, and in some parts of Maryland.

A study such as that of the Commission requires complete and authoritative factual data. But because there is a possibility that school records of the race of students might be used in a discriminatory manner in recommendations to colleges and universities and to prospective employers, the Commission cannot request the maintenance of permanent school records by race.

Findings

1. No agency of the United States Government, other than this Commission, has collected

data either on public school enrollment by race since the school year 1953-54, or on the existence of segregation or nonsegregation by policy practice in the public schools of the nation.

2. The public school study of the Commission has been rendered difficult by the lack of such information within the Federal Government and by the policy, adopted by some States and school districts that maintained racially segregated schools immediately prior to May 17, 1954, to discontinue recording the race of pupils.

Recommendation No. 2

Therefore, the Commission recommends that the Office of Education of the Department of Health, Education, and Welfare, in cooperation with the Bureau of the Census of the Department of Commerce, conduct an annual school census that will show the number and race of all students enrolled in all public educational institutions in the United States, and compile such data by States, by school districts, and by individual institutions of higher education within each State. Further, that initially this data be collected at the time of the taking of the next decennial census, and thereafter from official State sources insofar as possible.¹

Statements

Supplementary Statement on Education

By Vice Chairman Storey and Commissioners Battle and Carlton

Although the portion of the report dealing with public education contains much interesting material, the text preceding the Findings and Recommendations is to a large extent argumentative and colored by the author's views of the sociological and philosophical aspects of the school integration problem. It is based largely upon information supplied by school officials from five large "border" cities which have integrated their schools. These officials appear to take pride in their accomplishment and constitute special pleaders for their cause. Little acknowledgment has been given to different con-

1. COMMISSIONER JOHNSON:

I have agreed to this recommendation with the understanding that it does not suggest or require that public educational institutions maintain school records by race and that the recommended school census can be taken without the maintenance of such records.

ditions found in large areas of the country where the problem is most acute.

Further study and investigation should be made of the areas where school integration efforts run counter to long-established customs and traditions that formerly had legal sanction.

This tremendously serious and complex problem will not be solved by hasty action but must have the most careful and sympathetic consideration, with due regard for the way of life of large numbers of loyal Americans.

Proposal to Require Equal Opportunity as a Condition of Federal Grants to Higher Education

By Chairman Hannah and Commissioners Hesburgh and Johnson

More than \$2 billion a year of Federal funds go for educational purposes and to educational institutions. The principal recipients of these funds are the nation's colleges, universities, and other institutions of higher education. Whether tax-supported or privately financed, they receive Federal grants and loans both for their general support and capital improvements as well as for research projects, special programs, and institutes.

Discriminatory admission policies and other practices are known to exist in a number of such institutions. None of the Federal agencies administering these educational assistance programs require proof or an attestation of nondiscrimination by the institutions as a condition for the receipt of Federal funds.

With its duty to "appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution," the Commission was compelled to ask whether it is consistent for the Federal Government to aid and support educational programs and activities in institutions of higher education which are not open to all citizens on an equal and nondiscriminatory basis.

While Congress has not required such conditions for these grants, the operations of the Federal Government are subject to the constitutional principle of equal protection or equal treatment.

The Supreme Court has held racial discrimination in public education to be a denial of equal protection. In regard to public institutions of higher education the courts have required the immediate admission of qualified students with-

out discrimination. The reasons for the gradual elimination of racial discrimination in elementary and secondary schools do not obtain in the field of higher education. There, immediate equality of opportunity for qualified students of all races is possible and necessary.

Although the equal protection clause of the Fourteenth Amendment applies only to State action, "it would be unthinkable," the Supreme Court has held, "that the same Constitution would impose a lesser duty on the Federal Government."

We believe that it is inconsistent with the Constitution and public policy of the United States for the Federal Government to grant financial assistance to institutions of higher education that practice racial discrimination.

We recommend that Federal agencies act in accordance with the fundamental constitutional principle of equal protection and equal treatment, and that these agencies be authorized and directed to withhold funds in any form to institutions of higher learning, both publicly supported and privately supported, which refuse, on racial grounds, to admit students otherwise qualified for admission.

Additional Proposal by Commissioner Johnson

While joining in the above proposal, I recommend that the policy set forth apply to all educational institutions that receive Federal funds, including public elementary and secondary schools. My reasons are set forth in my closing statement at the end of this report.

Separate Statement on Conditional Federal Grants for Higher Education

By Vice Chairman Storey and Commissioners Battle and Carlton

We oppose the recommendation that Federal agencies be authorized to withhold all public funds from institutions of higher learning (public and private) which refuse, on racial grounds, to admit students otherwise qualified for admission for the following reasons:

1. The Commission has agreed that the preservation and improvement of education is a matter of great national interest, and is a fundamental principle within which the problems of equal protection must be evaluated. Therefore, we

cannot conscientiously endorse a program which might well undermine that principle.

2. Present problems of equal protection pertaining to education fall within the sweep of the Fourteenth Amendment, an area long since pre-empted by the courts. We cannot endorse a program of economic coercion as either a substitute for or a supplement to the direct enforcement of the law through the orderly processes of justice, as administered by the courts.

3. Such a proposal by this Commission—as an

agency of the Federal Government—would drastically affect the administration of privately owned institutions of higher education. Such action goes beyond the scope of the Commission's duties.

4. Our staff studies were directed toward understanding and evaluation of equal protection problems in public and secondary schools, not private schools upon any level, and not institutions of higher education, whether public or private.

Housing

The Problem

It is the public policy of the United States, declared by the Congress and the President and in accord with the declared purposes of the Constitution, that every American family shall have equal opportunity to secure a decent home in a good neighborhood. Since the home is the heart of a good society it is essential that this aspect of the promise of equal protection of the laws be fulfilled forthwith.

From the Commission's study of housing two basic facts were found to constitute the central problem.

First, a considerable number of Americans, by reason of their color or race, are being denied equal opportunity in housing. A large proportion of colored Americans are living in overcrowded slums or blighted areas in restricted sections of our cities, with little or no access to new housing or to suburban areas. Most of these Americans, regardless of their educational, economic, or professional accomplishments, have no alternative but to live in used dwellings originally occupied by white Americans who have a free choice of housing, new or old. Housing thus seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay. It would be an affront to human dignity for any one group of Americans to be restricted to wearing only hand-me-down clothing or to eating the leftovers of others' food. Like food and clothing, housing is an essential of life, yet many nonwhite American families have no choice but secondhand homes. The results can be seen in high rates of disease, fire, juvenile

delinquency, crime and social demoralization among those forced to live in such conditions. A nation dedicated to respect for the human dignity of every individual should not permit such conditions to continue.

Second, the housing disabilities of colored Americans are part of a national housing crisis involving a general shortage of low-cost housing. Americans of lower income, both colored and white, have few opportunities for decent homes in good neighborhoods. Since most suburban housing is beyond their means, they remain crowded in the central city, creating new slums. Since colored people comprise a rising proportion of the city dwellers with lowest income, these slums are becoming increasingly colored. The population of metropolitan areas, already comprising over 60 percent of the American people, is growing rapidly not merely by births but by migration. These migrants, many of them colored, most of them unadapted to urban life, form the cutting edge of the housing crisis. From these facts it is evident that for decent homes in good neighborhoods to be available for all Americans, two things must happen: the housing shortage for all lower income Americans must be relieved, and equality of opportunity to good housing must be secured for colored Americans. If racial discrimination is ended but adequate low-cost housing is not available, most colored Americans will remain confined in spreading slums. If low-cost housing is constructed in outlying areas and little or none of it is available for colored Americans, the present inequality of opportunity and the resulting resentments and frustrations will be accentuated.

The need is not for a pattern of integrated housing. It is for equal opportunity to secure decent housing. The difficulties in achieving this are considerable. Most of the available city land is already occupied and the cost of clearing slum property for new low-rent housing is practically prohibitive without Government assistance. The pressure for expansion of overcrowded Negro areas is so great that when an opening occurs, the pent-up Negro demand pours into the new neighborhood and the white residents usually flee in panic. The Negro's need for an alternative to blockbusting as a way of securing housing must be met just as the legitimate interests of white neighborhoods on the edge of Negro expansion areas must be protected. To achieve both these results and relieve the pressure of the present Negro concentration, new housing opportunities available to Negroes on all levels of income must be opened in the metropolitan area generally; slum clearance and the construction of new housing must take place in the central city.

The development of adequate and sound programs to achieve such equal opportunity to decent housing is urgent. The Commission found that a number of existing city, State, Federal, and private programs are contributing to this. It offers the following specific findings and recommendations as a further contribution to the necessary public understanding and action.

City and State Laws, Policies, and Programs

Findings

In New York City, as in Pittsburgh and in four States—Colorado, Connecticut, Massachusetts, and Oregon—there are far-reaching laws against discrimination in the sale or rental of multi-unit private housing, and all publicly-assisted housing. In New York State, as in 10 other States, there are laws against discrimination in publicly-assisted or urban renewal housing. Officials and community leaders in New York testified that these laws are having a valuable educational effect and that their enforcement, principally through mediation by the city Commission on Intergroup Relations and the State Commission Against Discrimination, is helping to promote equal opportunity in housing.

In Atlanta, the work of the Mayor's West Side Mutual Development Committee, representing equally the Negro and white people in the area of the city undergoing the greatest racial transition, has served to replace blockbusting and reduce racial tension and violence by means of expanding Negro residential areas through negotiation and consent. This has enabled Negroes in Atlanta, unlike those in most American cities, to gain access to good outlying land and to build new suburban neighborhoods.

In Chicago, which has neither New York's laws against discrimination nor Atlanta's policy of negotiating agreements for Negro expansion, the Commission found that the Negroes' primary method of securing better housing was through the mutually unsatisfactory system of blockbusting, with the consequent uprooting of adjacent white neighborhoods and with inevitable racial tension and occasional violence.

On the basis of its hearings in these three cities the Commission finds that, whatever the particular approach adopted, some official city and State program and agency concerned with promoting equal opportunity to decent housing is needed. Such programs and agencies can bring about better public understanding of the problems and better communication between citizens. Whether or not cities or States are prepared to adopt antidiscrimination laws, and even in areas where racial separation is the prevailing public policy, it is possible that through interracial negotiation practical agreements for progress in housing can be reached. Where public opinion makes possible the adoption of laws against discrimination in housing, this might contribute significantly to the work of the agency promoting equal opportunity in housing. Then the agency would have legal support in its efforts at mediation and conciliation.

Recommendation No. 1

The Commission recommends that an appropriate biracial committee or commission on housing be established in every city and State with a substantial nonwhite population. Such agencies should be empowered to study racial problems in housing, receive and investigate complaints alleging discrimination, attempt to solve problems through mediation and conciliation, and consider whether these agencies should be strengthened by the enactment of legislation for

equal opportunity in areas of housing deemed advisable.¹

Overall Federal Laws, Policies, and Programs

Findings

The Federal Government now plays a major role in housing. Its participation in slum clearance, urban redevelopment, public housing and mortgage loan insurance amounts to billions of dollars. The Constitution prohibits any governmental discrimination by reason of race, color, religion, or national origin. The operation of Federal housing agencies and programs is subject to this principle. In addition there is in effect an act of Congress adopted in 1866 and reenacted in 1870 that recognizes the equal right of all citizens, regardless of color, to purchase, rent, sell, or use real property.

While the fundamental legal principle is clear, Federal housing policies need to be better directed toward fulfilling the constitutional and congressional objective of equal opportunity. Norman Mason, the Administrator of the Housing and Home Finance Agency, who is responsible for coordinating the various housing programs of the constituents of HHFA, testified before this Commission that he intends to develop policies that will further promote the principle of equal opportunity in all these housing programs. The Commission finds that there is much that the Administrator of the HHFA can do, through careful and determined administration, to assure that the principle of equal opportunity in Federal housing programs is applied not only in the top policies but at the operating levels in each constituent agency.

Because of the paramount national importance of this problem the Commission finds that direct action by the President in the form of an Ex-

ecutive Order on equality of opportunity in housing is needed. The order should apply to all Federally-assisted housing, including housing constructed with the assistance of Federal mortgage insurance or loan guarantees as well as Federally-aided public housing and urban renewal projects.

There have been such Executive Orders calling for the application of the principles of equal opportunity and equal treatment in the fields of Government contracts and Government employment, and in the armed services. Instead of establishing a new Presidential Committee, as was done in these other Executive Orders, the President could request the Commission on Civil Rights, if its life is extended, to conduct the necessary continuing studies and investigations and make further recommendations.

Recommendations Nos. 2 and 3

Therefore, the Commission recommends

2. That the President issue an Executive Order stating the constitutional objective of equal opportunity in housing, directing all Federal agencies to shape their policies and practices to make the maximum contribution to the achievement of this goal, and requesting the Commission on Civil Rights, if extended, to continue to study and appraise the policies of Federal housing agencies, to prepare and propose plans to bring about the end of discrimination in all Federally-assisted housing, and to make appropriate recommendations.

3. That the Administrator of the Housing and Home Finance Agency give high priority to the problem of gearing the policies and the operations of his constituent housing agencies to the attainment of equal opportunity in housing.

FHA and VA

Findings

The present policy of the Federal Housing Administration and the Veterans' Administration is not to do further business with a builder who has been found in violation of a State or city law prohibiting discrimination. However, waiting upon the appropriate State or city agency to make a finding of violation of State or city law may result in Federal assistance to a

1. COMMISSIONERS HESBURGH AND JOHNSON: We wish to add that in line with the Commission's recommendation for biracial committees, it would be helpful if all real estate boards admitted qualified Negroes to membership. In view of the important role real estate boards play in determining housing policies and patterns throughout a community, we believe these boards are not merely private associations but are clothed with the public interest and that the constitutional principle of nondiscrimination, applicable to all parts of our public life, should be followed. With white and Negro realtors meeting and working together, misunderstandings could be cleared up and there would be greater possibility of solving racial housing problems through negotiation, understanding, and goodwill.

builder who is openly or manifestly evading such law. By the time any State or city action against such a builder has been completed the projects may well have been built and sold or rented on a discriminatory basis.

Recommendation No. 4

Therefore, the Commission recommends that, in support of State and city laws the Federal Housing Administration and the Veterans' Administration should strengthen their present agreements with States and cities having laws against discrimination in housing by requiring that builders subject to these laws who desire the benefits of Federal mortgage insurance and loan guaranty programs agree in writing that they will abide by such laws. FHA and VA should establish their own factfinding machinery to determine whether such builders are violating State and city laws, and, if it is found that they are, immediate steps should be taken to withdraw Federal benefits from them, pending final action by the appropriate State agency or court.

Public Housing

Findings

The location of sites for public housing projects and the kind of housing provided play an important part in determining whether public housing becomes almost entirely nonwhite housing, whether it accentuates or decreases the present patterns of racial concentration, and whether it contributes to a rise in housing standards generally. A policy of "scatteration" of smaller projects throughout the whole metropolitan area may remedy some of the present defects of public housing.

Public housing projects can serve as schools for better housing and home keeping. A large number of the tenants are recent migrants from rural areas, unprepared for urban life. Placing them in decent housing units and requiring that decent standards be maintained will help them make a successful adjustment to city life. Locating these projects in better neighborhoods and making them less institutional in appearance will add to this educational process.

As a result of the large number of nonwhites in need of low-cost housing and the tendency of whites to avoid living in the midst of a non-white majority, many projects are all or pre-

dominantly nonwhite. This may result in a proportion of nonwhite occupancy higher than that actually required under the Public Housing Administration's "racial equity" formula based on the estimated needs of the two racial groups. In one city the Commission found that the location of public housing sites within areas of Negro concentration resulted in *de facto* discrimination against low-income white citizens.

Recommendation No. 5

Therefore, the Commission recommends that the Public Housing Administration take affirmative action to encourage the selection of sites on open land in good areas outside the present centers of racial concentration. PHA should put the local housing authorities on notice that their proposals will be evaluated in this light. PHA should further encourage the construction of smaller projects that fit better into residential neighborhoods, rather than large developments of tall "high rise" apartments that set a special group apart in a community of its own.

Urban Renewal

Findings

City and private programs of slum clearance, conservation, and redevelopment, assisted by Federal aid from the Urban Renewal Administration, are changing the face of the nation. Since nonwhite residents comprise a large proportion of the persons displaced by these programs and since nonwhites do not have equal opportunity to housing, it is important that special needs and problems of the nonwhite minority receive adequate and fair consideration in all such programs.

Recommendation No. 6

Therefore, the Commission recommends that the Urban Renewal Administration take positive steps to assure that in the preparation of overall community "workable programs" for urban renewal, spokesmen for minority groups are in fact included among the citizens whose participation is required.

Supplementary Statement on Housing

By Vice Chairman Storey and Commissioners Battle and Carlton

We yield to no one in our goodwill and

anxiety for equal justice to all races, in the field of housing as elsewhere. A good home should be the goal of everyone regardless of color, and the Government should aid in providing housing in keeping with the means and ambitions of the people. Government aid is important where public improvements have displaced people and where slums become a liability to the community. This does not mean, however, that the Government owes everyone a house regardless of his ambition, industry, or will to provide for himself. When generosity takes away self-reliance or the determination of one to improve his own lot, it ceases to be a blessing. We should help, but not pamper. But there remains a financial limit beyond which the Government cannot go.

In dealing with the problem of housing, we must face realities and recognize the fact that no one pattern will serve the country as a whole. Some parts of the foregoing report are argumentative, with suggestions keyed to integration rather than housing, and if carried out in full will result in delay and in many cases defeat of adequate housing, which is our prime objective. The repeated expressions, "freedom of choice," "open housing," "open market," and "scattering" suggest a fixed program of mixing the races anywhere and everywhere regardless of the wishes of either race and particular problems involved. The result would be dissension, strife, and even violence evident in sections where you would least expect it.

To us it is not only wise but imperative that biracial committees be set up in different sections to provide areas for adequate housing in keeping with just requirements for the people involved. This can be done, it is being done in different sections such as Atlanta, Georgia, in keeping with the wishes of both races. This responsibility, however, must be met in a positive, courageous and constructive manner in keeping with the requirement at the local level.

Supplementary Statement on Housing

By Commissioners Hesburgh and Johnson

While the Commission has not had time to consider many important aspects of the complicated housing problem in view of its primary attention to investigations of alleged denials of the right to vote, and of its studies in the education field, three points that were much under

discussion in the Commission's housing hearings in our opinion deserve special attention.

(1) Relocation of Persons Displaced By Federally-Aided Projects

The Commission has found that nonwhite Americans constitute a high proportion of those displaced by urban renewal programs (and, it should be added, by Federally-aided highway programs), and that such nonwhites are severely restricted in their housing opportunities. We believe that, in addition to the recommendation of the Commission that in the preparation of local "workable programs" for urban renewal there be adequate nonwhite participation, other measures should be taken to assure that the human side of slum clearance and redevelopment is given adequate attention.

For instance, the Federal-aid highway program, which is displacing an increasing number of urban residents and is often being used to clear slums, has no provision requiring that displaced families be rehoused in accordance with specific standards, nor is any financial assistance provided for their relocation. While property owners receive compensation for property condemned, the problem of relocation arises largely in urban areas where those displaced, many of them tenants who receive no compensation, have great difficulty finding, or cannot find, decent, safe, and sanitary dwellings within their means.

In the urban renewal program, on the other hand, the act of Congress requires that "decent, safe, and sanitary dwellings" be available at rents and prices within the financial means of the displaced families, either in the urban renewal area itself, or in areas "not generally less desirable." However, the Commission received evidence that such housing for relocation is in some places not in fact available.

President Eisenhower has said that steps must be taken "to insure that families of minority groups displaced by urban redevelopment operations have an opportunity to acquire adequate housing." It seems to us essential that all the Federal agencies take such positive steps to assure that these minimum human requirements of slum clearance and redevelopment are in fact met by the local communities.

While the Federal-aid highway program should not be turned into a housing program, the act should be amended to provide that in any urban area where any substantial number

of low-income persons are to be displaced by the construction of a Federally-aided highway, the locality must incorporate the highway program in its urban renewal program, and the relocation requirements and standards of the Urban Renewal Administration must be met in regard to all such displaced persons, or the localities must otherwise see that decent, safe, and sanitary housing is available to such persons.

(2) Racial Patterns in Urban Renewal

As President Eisenhower has also said, the Federal Government must "prevent the dislocation of such [minority group] families through the misuse of slum clearance programs." In the Commission's housing hearings there were allegations that urban renewal programs are being used in some instances for "Negro clearance" and that either new patterns of segregated neighborhoods are being created or existing patterns of segregation are being substantially accentuated. With the nonwhite citizens' participation in planning urban renewal at the local level which the Commission has recommended such questions should be raised at an early stage. In addition, we recommend that communities' "workable programs" and specific urban renewal projects be examined by the Urban Renewal Administration and the Housing and Home Finance Administrator to assure that no community is using Federal urban renewal assistance to accomplish such results. Examination of each urban renewal project in this light will require the services of persons of special competence in the field of intergroup relations.

(3) The Shortage of Low-Cost Housing

The studies and hearings of the Commission have shown that progress in remedying the lack of opportunity to decent housing by nonwhite Americans depends in large part upon progress in overcoming the general housing shortage for lower-income Americans. This is also directly connected with relocation and urban renewal. Slum clearance and urban redevelopment are necessary but they require the

provision of decent low-cost housing for those displaced. President Eisenhower has said that the Government will "encourage adequate market financing and the construction of new housing for such families on good, well-located sites."

In the absence of better answers, it seems imperative that the present programs of urban renewal, public housing, home mortgage insurance and assistance, including the Voluntary Home Mortgage Credit Program, be continued on a sufficiently long-term basis to make sound planning by local housing authorities possible. Beyond this, most officials, housing experts and industry leaders testified that further efforts must still be undertaken to encourage the construction and sale of decent low-cost private housing.

The Commission did not try to make specific recommendations in these areas that require expert knowledge, but we would like to stress the importance of this being done and of sound measures being put into effect by those who are so competent.

In view of the testimony in Atlanta and Chicago that the ceiling on section 221 (low-cost relocation housing) mortgage insurance is too low for new housing in urban areas and in view of the recent action of Congress in approving an increase in the permissible amounts of FHA mortgage insurance, including an increase in the ceiling on section 221, consideration should be given to raising the section 221 limitations to levels consistent with the cost of new housing in urban areas. Consideration should also be given to proposals made by leaders of the housing industry in the Commission's hearings for the reduction of the cost of financing housing for lower-income residents, including proposals for special mortgage assistance through the Federal National Mortgage Association and for direct loans such as those provided at 3½ percent interest for 40 years in the college housing program of the Community Facilities Administration.

Without trying to appraise particular proposals, it can be said that programs to overcome the housing shortage for lower-income Americans are not luxuries but are essential needs of the nation.

EDUCATION, HOUSING

Student Organizations and Housing—California

The University of California issued a statement, adopted by the Regents on July 17, 1959, relating to its policy against discrimination based on race, religion or national origin in University affairs and facilities. It stated that University recognition and privileges will be withdrawn from any student organization failing to file with the University a copy of its constitution or charter and a statement signed by its chief officer that it has no membership rules or policies based on race, religion, or national origin—except that an organization governed by a discriminatory clause in a national constitution will become subject to these University regulations when such clause is eliminated or the local organization is exempted from its operation, but in no event later than September 1, 1964. In addition, the statement declares that privately-owned housing facilities which discriminate against students because of race, religion, or national origin shall be removed from the approved list.

STATEMENT OF UNIVERSITY POLICY
CONCERNING NON-DISCRIMINATION
BY STUDENT ORGANIZATIONS AND IN
APPROVED STUDENT HOUSING

The University of California has always had a policy in the administration of its affairs against discrimination based on race, religion or national origin. This policy has been followed strictly in the admission of students to the University and in the utilization of all of the University's facilities. All groups operating under the administrative control of The Regents, including administration, faculty, student governments, and University-owned residence halls, are governed by this policy of non-discrimination.

Private groups which surround University campuses and which in various ways provide services to the University or its students are not bound by the University's non-discrimination policy if they do not receive special privileges from the University and are not subject to its control.

Somewhat different problems are presented by the many organizations composed of University students which are essentially private organizations but which are recognized by the University or by student governments. They are entitled to certain privileges such as use of University facilities and are subject to certain University regulations (e.g., rules governing students living in fraternities and sorority houses). Most organizations of this type, including most social fraternities and sororities, honorary societies, and professional societies, have long had as an essential aspect of their operations the freedom of their members to choose the persons who shall be included in their

groups. The University recognizes and approves this freedom of essentially private groups to select their own members.

A few groups with such a special relation to the University still are subject, however, often against the wishes of their local members, to external restraints requiring discrimination. In accordance with the traditions of the University, there must be freedom for all such groups to choose members on a basis of individual evaluation unfettered by policies which require discrimination on the grounds alone of race or religion or national origin regardless of the personal merit of the fellow student. Consequently for such groups having a special reciprocal relationship of privileges from any obligations to the University, the University, in accordance with its basic philosophy of non-discrimination, must insist that the students participating in such organizations be freed from any external restraints requiring said discriminatory practices.

In accordance with the general policies expressed above, the following regulation governing student groups has been approved to apply to all campuses of the University:

1. Discrimination based on race, religion, or national origin is specifically forbidden in the administration of the affairs of student governments and their subsidiary agencies.

2. All other student organizations which are recognized by the University or by the student governments as a condition of recognition shall have a membership policy which does not require discrimination based on race, religion, or national origin. The members of such organization shall be free to choose their own associates according to their own best judgment, and

should not be confined to selection within a system of categories which finds its origin in racial or religious discrimination. Where such groups operate on a basis of selected membership, the students participating in them shall be permitted to choose members free from the restraints of said discriminatory policies imposed by constitutions, agreements, alumni or other non-students, or other organization rules. With respect to the few remaining student organizations (including fraternities and sororities) which are bound by discriminatory clauses in national constitutions or other regulations beyond the power of the local organization to change, and in order to proceed with all deliberate speed in the elimination of said discriminatory policies, this regulation shall become effective at the earliest possible date when (1) said discriminatory clauses in national constitutions and in other national regulations can be eliminated; or (2) the local organizations specifically are exempted by the national organizations from the effect of such discriminatory clauses, and in no event later than September 1, 1964.

3. Each organization covered by the policy in Paragraph 2 shall deposit with the Dean of Students or equivalent officer on the relevant campus by January 1, 1960, copies of all constitutions, charters, or other documents relating to their policies with reference to choice of membership. By the same date, they shall also de-

liver to the same officer a statement signed by the president or similar officer of the local organization to the effect that there are no rules or policies which inhibit the members from accepting students without discrimination on account of race, religion, or national origin in the selection of members. (Organizations falling within the exception in the last sentence of Paragraph 2 may delay filing the non-discrimination statement until the governing date under Paragraph 2.) This statement shall be renewed annually and the other documents required by this paragraph shall be refiled within ninety days after any substantive change or amendment.

4. Nothing contained in this statement of policy shall interfere with the traditional alumni-chapter relationships except as set forth above.

5. Privately owned housing facilities which are inspected and approved by the University for student housing shall be open to all students without discrimination based on race, religion, or national origin. This paragraph does not apply to student organizations covered by Paragraph 2.

6. Violation of the policy set forth in Paragraph 2 shall result in the withdrawal of University recognition and of any University privileges from the group involved. Violation of the policy set forth in Paragraph 5 shall result in the removal of the housing facility involved from the approved list.

EMPLOYMENT

Fair Employment Laws—New York

STATE COMMISSION AGAINST DISCRIMINATION on the complaint of Albert MILLER against CHECKERS AND CLERKS UNION, LOCAL #1, ILA-Ind. and Teddy Gleason as President of Checkers and Clerks Union, Local #1, ILA-Ind.

New York State Commission Against Discrimination, Executive Department, June 1, 1959, Complaint Case No. C-4750-57.

SUMMARY: A Negro resident of New York City, in an amended complaint filed with the State Commission Against Discrimination (SCAD), charged Local No. 1, Checkers Union, International Longshoremen's Association, Independent, and the Local's president (respondents) with refusing to give him a membership application form and with repeatedly refusing to admit him into membership because of race and color, in violation of the state Law Against

Discrimination. After determining that probable cause existed to credit these allegations, the Investigating Commissioner, failing in attempts to eliminate the discriminatory practices by conference, conciliation, and persuasion, served notice of hearing and a copy of the amended complaint on respondents. Respondents filed an answer, but subsequently requested a resumption of the procedure of conference, conciliation and persuasion in this and two other complaint cases then pending against them before SCAD, upon the stipulated terms that respondents cease and desist from considering race, creed, color, or national origin in determining the acceptability of individuals for union membership and take other measures specified by SCAD relative to continuing non-discriminatory practices. It was also stipulated that complainants would be admitted to union membership upon the payment of dues and would be accorded seniority status commencing with the dates of their entry into the industry. And it was finally stipulated that if respondents' union should not fully comply with all these terms to SCAD's satisfaction, SCAD might enter an order against respondents embodying the stipulated terms.

WHEREAS: On June 26, 1957, Albert A. Miller, a Negro, then residing at 411 West 148th Street, apartment 6, New York, New York, made, signed and filed with the New York State Commission Against Discrimination a verified complaint charging Local 1, Checkers Union, International Longshoremen's Association, Independent with an unlawful discriminatory practice in refusing to admit him to membership because of his color, and

On August 18, 1958, the complainant Albert A. Miller, made, signed and filed with the Commission an amended complaint, which as subsequently amended is directed against CHECKERS AND CLERKS UNION, LOCAL NO. 1, ILA-Ind. and TEDDY GLEASON as President of CHECKERS AND CLERKS UNION, LOCAL NO. 1, ILA-Ind.

The amended complaint charges in substance as follows:

"The respondents committed unlawful discriminatory acts in violation of Section 296 subdivision 1 of the Law Against Discrimination by excluding me and by continuing to exclude me from membership in the respondent union because of my race and color.

"Upon information and belief, the respondents have committed and are continuing to commit unlawful discriminatory acts in violation of Section 296 subdivision 1 of the Law Against Discrimination by excluding all Negroes from membership in the respondent union because of their race and color.

"On June 24, 1957 I applied for membership in the respondent union at its office in 250 West 57th Street, New York, New York.

"The person in charge of the office refused to give me a membership application form.

"Although I have made repeated attempts to gain admission subsequent to June 24, 1957 the respondents have refused to admit me into membership."

The allegations of said amended complaint were duly investigated by Elmer A. Carter, Commissioner, with the aid and assistance of the Commission's staff.

After such investigation the Investigating Commissioner determined that probable cause exists to credit the allegations of said amended complaint.

The Investigating Commissioner then endeavored by conference, conciliation and persuasion, to eliminate the unlawful discriminatory practices complained of.

After failure of said efforts at conference, conciliation and persuasion the Investigating Commissioner did direct that a notice of hearing be issued and served on the respondents in the name of the Commission together with a copy of said amended complaint, all pursuant to Section 297 of the Law Against Discrimination.

The notice of hearing and the amended complaint were served on the respondents on the 15th day of April, 1959.

The respondents filed their answer in duplicate with the State Commission Against Discrimination on the 27th day of April, 1959.

Thereafter the respondents by their answer denied and herewith reaffirms their denial of each and every allegation previously set forth above except the allegation that on June 24, 1957, Mr. Miller applied for membership in the respondent Union at its office in 250 West 57th

Street, New York, which allegation was admitted by failure to deny the same.

NOW THEREFORE IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS there was, at the respondent's request a resumption of the procedure of conference, conciliation and persuasion in such complaint case and two other verified complaint cases then also pending in the Commission's offices to wit, James Caldwell v. Checkers Local No. 1, ILA-Independent, C-5996-59 and James Bey v. Checkers and Clerks Union, ILA-Ind. and Teddy Gleason as President, C-4630-57 upon the terms and conditions hereinafter set forth.

STIPULATION AND AGREEMENT

That the respondent labor union named herein, its agents, servants and employees shall cease and desist from giving consideration to the factors of race, creed, color or national origin in determining the acceptability of individuals for membership in respondent union.

That the respondent labor union named herein shall take the following affirmative action, which in the judgment of the State Commission Against Discrimination will effectuate the purposes of the Law Against Discrimination.

1. That the respondent union will forthwith admit Mr. Albert A. Miller into membership upon payment of one quarters annual dues in lieu of any initiation fee.

2. That the respondent union will forthwith accord Mr. Albert A. Miller a seniority status commencing with the date of his entry into the Industry which was on or about June 24, 1957.

3. That the respondent union will forthwith admit Mr. James Caldwell into membership upon payment of one quarters annual dues in lieu of any initiation fee.

4. That the respondent union will accord Mr. Caldwell a seniority status commencing with the date of his entry in the industry which was on or about January 1, 1942.

5. That the Executive Board of respondent union will consider forthwith the membership application of Mr. James Bey without regard to his race, color, creed or national origin and if for any reason Mr. Bey is not approved for membership in the respondent union that then and in that event, an affidavit stating the reasons for said rejection will be submitted to the State Commission Against Discrimination.

6. That the respondent union will apply the same standards to all applicants now or hereafter seeking admission to the Union and to all members of the Union, without regard to race, creed, color or national origin.

7. That the respondent union will adopt and put into operation rules and procedures for the processing of applications for membership in a manner that will, to the satisfaction of the State Commission Against Discrimination, insure consideration of all applicants for membership.

8. That the respondent union will promulgate and make available to all applicants for membership and to the State Commission Against Discrimination a copy of said Rules and Procedure, referred to in paragraph 7 supra.

9. That the respondent Union will for a period of one year from the date of this agreement transmit to the State Commission Against Discrimination quarterly the names of all applications for membership received during the preceding quarter and the names, addresses and dates of admission of all those persons admitted into the Union during the preceding quarter and the sums paid as initiation fees by each of such persons, if any, and the names of the sponsors of such individuals, if any.

10. That the respondent union will transmit to the State Commission Against Discrimination within thirty days after the date of this stipulation a statement setting forth the addresses and dates and names of all applicants for admission into respondent Union, pending at the date hereof.

11. That the respondent union will display the State Commission Against Discrimination Poster prominently in an easily accessible and well-lighted place where it may be seen and read by all applicants for union admission and by all members of the Union.

CONSENT ORDER

IT IS FURTHER STIPULATED AND AGREED, that if the respondent union does not fully comply with all of the terms of the stipulation to the satisfaction of the State Commission Against Discrimination that then and in that event the State Commission, in the exercise of its discretion may make and enter an order directed to the respondents herein, pursuant to Section 297 of the Law Against Discrimination, which order shall embody the terms and provisions of this stipulation.

AND IT IS FURTHER STIPULATED AND AGREED, that the entire record in this proceeding shall consist of the above described complaint as amended, the Investigating Commissioner's determination that probable cause exists to credit the allegations of such amended complaint, the notice of hearing, the affidavit of service of the notice of hearing and the amended complaint, the respondents' answer and this stipulation and the order of the State Commission Against Discrimination to be made herein; and respondents waive their right to a hearing, to the making of findings of fact and conclusions of law and to further proceedings by or before the Commission.

AND IT IS FURTHER STIPULATED AND AGREED, that upon application of the State Commission Against Discrimination, the Supreme Court of the State of New York may

make and enter an order enforcing, in whole or in part, order of the State Commission Against Discrimination made and entered as hereinabove set forth, and the respondent expressly waives notice of such application by the State Commission Against Discrimination and any right to consent to the making and entry of an order by the Supreme Court of the State of New York enforcing, in whole or in part, said order of the State Commission Against Discrimination and any right to apply to the Supreme Court of the State of New York for leave to adduce additional evidence herein;

s/Thomas W. Gleason,
President
RESPONDENT

s/Elmer A. Carter
INVESTIGATING COMMISSIONER

HOUSING

Publicly-Assisted Housing—New Jersey

On the Complaint of Reginald K. SMITH v. Bruno I. FROMM, President of Morristown Gardens, Inc., and Morristown Gardens, Inc.

State of New Jersey, Department of Education, Division Against Discrimination, July 22, 1959, Complaint Case No. H14-10R.

SUMMARY: A Negro filed a complaint with the New Jersey Department of Education, Division Against Discrimination, against a corporate owner of certain apartments in Morristown, New Jersey, and its president, alleging that because of racial discrimination he had been denied the opportunity to rent one of respondents' apartments during March and April of 1958, in violation of the State Law Against Discrimination. An investigation by Division representatives resulted in a finding of probable cause to credit the allegations. Attempts to conciliate were unavailing, and a hearing by the State Commissioner of Education was held. Respondents urged that since the statute invoked covers only publicly assisted housing, and since the FHA-insured mortgage on the premises in question had been paid off on April 23, 1959, the housing was no longer publicly assisted and the Commissioner therefore lacked jurisdiction. The Commissioner held that, the alleged acts having occurred while public assistance was still in effect, he had acquired jurisdiction that could not be defeated by a subsequent abandonment of such assistance. On the merits, it was found that discrimination as alleged had occurred, wherefore respondents were ordered to cease and desist from

racial discrimination in the rental of their apartments and to make a bona fide written offer to rent complainant an apartment under the same conditions that it would be offered to others, whenever an apartment of the room-size desired became vacant.

RAUBINGER, Commissioner of Education.

INTRODUCTION

On June 4, 1958, a complaint was filed by Reginald K. Smith, a Negro, charging that during March and April of 1958 he was denied the opportunity to rent an apartment at Franklin Manor Apartments, otherwise known as Morristown Gardens, Inc., in Morristown, New Jersey, because of discrimination due to his race. The complaint alleges a series of visits by complainant to the Franklin Manor Apartments, at the conclusion of which the complainant was advised that if he filed an application for rental of an apartment it would be turned down. The results of an investigation of the complaint by representatives of the Division Against Discrimination led to a finding of probable cause to credit the allegations of the complaint. See R.S. 18:25-4 and 18:25-9.1, and 18:25-5 (k).

An answer filed by respondents alleges insufficient knowledge of the allegations of the complaint to affirm or deny, except that discrimination against the complainant due to his race was specifically denied.

The answer also sets up four affirmative defenses:

- (1) that the Law Against Discrimination is unconstitutional;
- (2) that the allegations of the complaint do not state a cause of action under the Law Against Discrimination;
- (3) that the housing accommodation in question is not publicly assisted within the meaning of the law; and
- (4) that the Commissioner has no jurisdiction over the subject matter of the complaint.

Attempts to conciliate the matter were of no avail, and as a result Mr. Bruno I. Fromm, President, Morristown Gardens, Inc., was noticed for a hearing which was held at 1100 Raymond Boulevard, Newark, New Jersey on June 4, 1959.

JURISDICTION

Although in the answer respondents question the constitutionality of the New Jersey Law Against Discrimination, they chose to waive argument on this point but reserved the defense

should the statute be declared unconstitutional in another case presently before the New Jersey courts.

However, they do question the Commissioner's jurisdiction of this matter because the previous FHA insured mortgage on the premises had just been paid off and Franklin Manor Apartments is now privately financed. There is no doubt that the FHA mortgage was paid off on April 23, 1959 (Exhibit R-1).

Respondents' argument that the Commissioner has no power to afford relief to complainant was based principally upon the word "is" in the definition of publicly assisted housing:

"... all housing financed in whole or in part by a loan, whether or not insured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof." (Emphasis supplied)

The respondents argue that this phrase means that since the guarantee does not exist, the Commissioner loses jurisdiction to afford relief.

The Commissioner cannot accept this argument. Respondent has had the advantages of governmental mortgage insurance for at least nine years and also had such assistance at the time the alleged act of discrimination occurred and the complaint was filed. Such advantages are undoubtedly real and afford the Commissioner jurisdiction over this matter. See 12 Rutgers Law Review 557. Fisher and Greenberg, the New Jersey Anti-Bias Law.

In the first place, the Commissioner believes that the word "is" in the above phrase is merely descriptive of a type of mortgage and not used in a limiting jurisdictional sense. The Commissioner's jurisdiction is acquired from the phrase, "all housing financed."

Although the Commissioner does not, for the purposes of this case, hold that his jurisdiction extends to all housing ever "financed," he does believe that when an alleged act occurs during a period of such public assistance he acquires a jurisdiction that cannot be defeated by a party's abandoning FHA financing. If this view were not true, the legislature, in passing this amendment to the act, would have given the Division

Against Discrimination a weak instrument with which to operate. For, any discriminator could, upon being called to a hearing, refinance his properties by private capital and continue to discriminate, thus making a mockery of the law. Indeed, the Commissioner believes that an owner having had the advantage of government-aided financing, is culpable for any illegal discrimination committed while the government aided financing is and/or was in force.

Furthermore, it is the Commissioner's view that the Law Against Discrimination has provided obligations upon a discriminator that he cannot so easily ignore by the mere means of private financing. Had the legislature determined a penalty against a discriminator or afforded a complainant even a civil remedy for damages, it would be quite clear that jurisdiction could not be defeated by subsequent action. However, our law affords cease and desist proceedings and a discriminator continues to be responsible in the first instant to redress injury to the complainant and thereafter to refrain from discrimination while covered by the act.

THE MERITS

The factual issue before the Commissioner is whether complainant Smith was refused an apartment at Franklin Manor because of his race.

It is clear from the testimony that rentals of apartments were primarily handled by the superintendent, Wilkinson, subject to final approval by Mr. Fromm, president of the corporation. While there was testimony to the effect that they had no set policy concerning acceptance of tenants; they took the "first best party" (p.136); that whether a person got an apartment is a matter of luck (p.75), it was clear that Mr. Wilkinson, in almost every instance, determined policy. Every applicant recommended by him has been accepted by Mr. Fromm. Superintendent Wilkinson did not afford Mr. Smith an opportunity to rent an apartment because of his race; because he was afraid Mr. and Mrs. Smith would not be "happy" there, and because he feared that the presence of southern tenants in the apartments would lead to trouble. (p.181)

While the status of vacancies in Franklin Manor is somewhat confusing in the record, it is clear that there were vacancies in Franklin Manor that might have been assigned to Mr. Smith (pp. 73, 75, 91, 92, etc.). And it is clearer

that Superintendent Wilkinson foreclosed Mr. Smith's application before any specific question of vacancy arose.

It was charged by counsel for respondents at page 184 that Smith had indicated his wish to occupy a three-room apartment. This Smith denied (pp. 184-185), stating that he would have occupied a four-room or even a five-room apartment had it been offered to him.

The Commissioner concludes, therefore, that Complainant Smith failed to be considered for an apartment or to be offered an apartment in Franklin Manor because he is a Negro.

FINDINGS OF FACT

1. Complainant, Reginald K. Smith, a Negro, made bona fide and repeated attempts to rent an apartment in Franklin Manor, Morristown, New Jersey, during March and April of 1958.
2. Superintendent Wilkinson handled the policy of "screening" tenants of Franklin Manor and refused to accept Mr. Smith because of his race.
3. Bruno I. Fromm as president of Morristown Gardens, Inc., owner of Franklin Manor, established and acquiesced in a system of such screening.
4. Franklin Manor Apartments was "a publicly assisted housing accommodation" within the meaning of the New Jersey law during the times pertinent to this matter. There were available vacancies which could have been utilized for rental to Mr. Smith had he not been turned down in his attempts.
5. Complainant Smith was denied an apartment in Franklin Manor because of discrimination due to his race.

ORDER

On the basis of the foregoing findings of fact and decision, pursuant to Section 16 of the Law Against Discrimination (Chapter 169, P.L. 1945 as amended), it is hereby ordered:

1. That respondents, Bruno I. Fromm and Morristown Gardens, Inc., their officers, servants, agent and assigns, cease and desist from discriminating against any and all persons because of their race or color in the rental of apartments in Franklin Manor, Morristown,

New Jersey, or other holdings of the corporation now covered, previously covered or hereafter covered by the Law Against Discrimination.

2. That aforesaid respondents issue instructions in writing to Superintendent Wilkinson and to other superintendents, their assistants and to their successors that there must be no discrimination in rentals of apartments to persons because of their race or color in any properties owned and/or managed by Morris-town Gardens, Inc. when such properties are or have been subject to the Law Against Discrimination.
3. That respondents make a bona fide offer, in writing, to complainant, Reginald K. Smith,

of an apartment at Franklin Manor, of a room-size to be specified by Complainant Smith whenever the first apartment of such room-size shall become vacant under the same conditions as such apartment would be offered to any other person.

4. That respondent notify the Commissioner within thirty days concerning the manner in which he has complied and/or plans to comply with this order.
5. That respondent inform the Commissioner as soon as possible of the room-size of the apartment specified by Complainant Smith and the date on which a bona fide offer of an apartment is made.

HOUSING

Student Housing—Washington

The office of the President of the University of Washington has issued a statement of "Policy on Student Housing," adopted by the Board of Regents on May 23, 1959, which states in part that assignments to University housing are made without regard to race, creed, or color, and that its listing services accept listings of privately operated accommodations only upon the understanding that they will be operated under the same policy.

Equal Availability of Housing

As a matter of policy, assignments to University residence halls and other housing facilities are made without reference to race, creed, or color, and the University expects privately operated accommodations offered through its list-

ing services to be operated in the same manner. Listings are accepted only with this understanding.

President's Office

By: Board of Regents (May 23, 1959)

ATTORNEYS GENERAL

EDUCATION Public Schools—Virginia

Chapter 72 (House Bill 68) of the Acts of the 1959 Virginia General Assembly, approved April 28, 1959, requires that children ages seven to sixteen regularly attend a public, private, or denominational school, or be taught by a qualified tutor, but it provides that the school board, upon the recommendation of certain officials and with written parental or guardian consent, shall excuse from attendance at school "any pupil who in their or his judgment cannot benefit from education at such school," and that the school board shall excuse from attendance "any pupil whose parent, (etc) . . . conscientiously objects to his attendance at such school as is available." The Act states that it shall be in force in every locality upon recommendation by resolution by the local school board and adoption by the local governing body, but that the local governing body might suspend it in the same manner as local ordinances are repealed. 4 Race Rel. L. Rep. 429 (1959). In response to a request from a member of the Virginia House of Delegates, representing Montgomery County, the Attorney General of Virginia on May 11, 1959, expressed the opinion that the local governing body is authorized only to adopt an ordinance putting the Act into effect in that locality and not to add to its provisions establishing what will, and what will not, be considered as "conscientious objection." On July 8, 1959, in response to a request by the Commonwealth's Attorney for Montgomery County, Virginia, the Attorney General submitted an ordinance, which upon adoption by the county board of supervisors, would put the provisions of the Act into effect in that county, stating his opinion that the provisions of the Act should not be included in the ordinance as that would have the effect of providing for compulsory school attendance rather than merely permitting the state law to become effective in the county. The opinions and the proposed ordinance appear below.

Proposed Ordinance

AN ORDINANCE to provide that an Act designated as Chapter 72, Acts of the General Assembly of Virginia, Extra Session of 1959, providing for the compulsory attendance of children between the ages of seven and sixteen in the schools specified in said Act, shall be in effect and in force within the County of Montgomery.

WHEREAS, the School Board of Montgomery County has recommended by resolution to the Board of Supervisors that an Act designated as

Chapter 72 of the Acts of the General Assembly of Virginia, Extra Session 1959, be adopted pursuant to Section 24 of said Act so that it shall be in effect and in force within the County of Montgomery; now, therefore,

BE it ordained by the Board of Supervisors of Montgomery County, Virginia, that an Act designated as Chapter 72, Acts of the General Assembly of Virginia, Extra Session 1959, providing for the compulsory attendance of children between the ages of seven and sixteen in the schools specified in said Act, shall, from and after September 1, 1959, be in effect and in force within the County of Montgomery.

Opinions

COMMONWEALTH OF VIRGINIA
OFFICE OF
THE ATTORNEY GENERAL
RICHMOND

May 11, 1959

Honorable A. L. Philpott
Member of the House of Delegates
Bassett, Virginia

My dear Mr. Philpott:

This is in reply to your letter of May 6, 1959, in which you pose the following question:

"With reference to the enabling legislation recently adopted, does a county board of supervisors have the authority, in enacting the ordinance dealing with compulsory school attendance to set forth in such ordinance certain provisions which would establish a standard definition of conscientious objection? In this connection, may the ordinance specifically set forth what will not be considered conscientious objection?"

Your question is directed to Chapter 72, Acts, Extra Session, 1959, approved April 28, 1959, which Act enables counties, cities and certain towns to provide for the compulsory attendance of children between the ages of seven and sixteen upon the public schools of this Commonwealth. Section 24 of the Act reads as follows:

§ 24. This Act shall be in force in every county, city or town, if such town be a separate school district, when it has been recommended by resolution of the county, city or town school board and duly adopted by the governing body of such county, city or town in the same manner as local ordinances are adopted. The operation of this Act may be suspended in any county, city or town if such town be a separate school district, by the governing body thereof in the same manner as local ordinances are repealed."

The language of this statute indicates that the only action to be taken by the local governing body is the adoption of an ordinance putting the Act into effect within the political subdivision. This Act does not authorize the governing body of a locality to enact any ordinance having the force and effect of law. It merely authorizes the proper officials of a locality to take action

which will make the State law enforceable in the particular county, city or town. It follows that your questions must be answered in the negative.

With best wishes, I am
Very sincerely yours,

A. S. Harrison, Jr.
Attorney General

11:22

* * *

COMMONWEALTH OF VIRGINIA
OFFICE OF
THE ATTORNEY GENERAL
RICHMOND

July 8, 1959

Honorable Julius Goodman
Commonwealth's Attorney
for Montgomery County
Christiansburg, Virginia

My dear Mr. Goodman:

This is in reply to your letter of July 3, 1959, in which you request this office to prepare an ordinance to be enacted by the Board of Supervisors of your county so that the provisions of Chapter 72, Acts of the General Assembly, Extra Session of 1959, will be in effect in your county.

I have drawn a short ordinance which I think will be sufficient when adopted pursuant to the provisions of Section 15-8 of the Code.

I do not believe the provisions of the Act should be included in the ordinance.

Chapter 72 is the State law requiring compulsory attendance in the public and other schools. As I understand Section 24 of the Act it does not authorize a board of supervisors to pass an ordinance providing for compulsory attendance in schools. This section merely authorizes the board of supervisors, upon the recommendation of the local school board, to elect, so to speak, by ordinance adopted as local ordinances are adopted, to permit the State law to become effective in the county.

I am enclosing a copy of an opinion, dated May 11, 1959, to Honorable A. L. Philpott, Member of the House of Delegates, which relates to this subject.

With best wishes, I am
Sincerely yours,

A. S. Harrison, Jr.
Attorney General

REFERENCE

Federal Review Of State Factual Determinations

I. State Administrative Agencies

The purpose of this portion of the Study is to analyze the generally accepted rules applicable to federal judicial review of factual determinations by state administrative agencies. The importance of this subject in civil rights and race relations litigation is clear. State and local school boards and voting registrars, for example, are administrative boards and increasingly the federal courts are faced with reviewing their determinations. Furthermore, the states have established various administrative agencies whose primary function is to resolve conflicts in this area—such as fair employment practices commissions and various state commissions against discrimination.

In the past federal courts have not reviewed state administrative action very frequently. This may be explained as a result of the application of the doctrines of exhaustion of state administrative remedies [see *Exhaustion of State Administrative Remedies*, 2 Race Rel. L. Rep. 561 (1957)] and equitable abstention [See *Exhaustion of State Judicial Remedies*, 2 Race Rel. L. Rep. 1215 (1957)] and of certain sections of the Judicial Code. 28 U.S.C.A. §§ 1341-42, 2283 (1950). Apparently, however, federal courts make no distinction between the review of a state administrative agency's findings of facts and those of a federal agency.

[Findings of Fact and Conclusions of Law]

One of the main problems which must be faced in a discussion of judicial review of an administrative agency's findings of fact, whether federal or state, is the elusive distinction between

questions of law and of fact. Voluminous and conflicting literature may be found on this distinction. See, e.g., Forkosch, *Administrative Law* §§ 338-343 (1956); Davis, *Administrative Law* §§ 244, 245, 247, 250, 254-57 (1951); Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 Harv. L. Rev. 953 (1957); Jaffe, *Judicial Review: Questions of Fact*, 69 Harv. L. Rev. 1020 (1956); Jaffe, *Judicial Review: Questions of Law*, 69 Harv. L. Rev. 239 (1956); Brown, *Fact and Law in Judicial Review*, 56 Harv. L. Rev. 899 (1943). The difficulty of distinguishing between law and fact is adequately summarized by Professor Jaffe:

"It is often said that in many situations it is difficult, perhaps indeed impossible, to make a clean distinction between fact and law; that the difference is one of degree, that the relation of fact and law can be described as a spectrum with finding of fact shading imperceptibly into conclusion of law. It is sometimes said that a question is fact or law depending on whether the court chooses to 'treat' it as one or the other." 69 Harv. L. Rev. at 239-240.

Findings of fact may be defined as follows:

"A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect. It can, for example, be made by a person who is ignorant of the applicable law....

"The phenomenon may be past, present, or future. It may be what we call an event, a

relationship, or a condition; it may be a state of mind. . . . A finding of fact does not require—because it cannot require—that the phenomenon so found have been or be an absolute reality. The finding is neither more nor less than an inference based on evidence.” Jaffe, *supra*, 69 Harv. L. Rev. 241-242.

Professor Brown defines questions of fact as “those questions which may be determined without reference to any rule or standard prescribed by the state—that is, without reference to law.” 56 Harv. L. Rev. at 901.

In order to define questions or conclusions of law, it is necessary to have some definition of law. Law may be said to consist of “those rules and standards of general application by which the state regulates human affairs.” Brown, *supra*, 56 Harv. L. Rev. at 901. Questions of law, therefore, are concerned with the application of these rules and standards. Professor Davis refers to questions of law as follows:

“Every determination which refines the meaning of a legal concept is to that extent analytically a determination of law, even though the facts to which the concept is applied are unique and may never again occur.” Davis, *supra*, § 245, at 875.

The courts and commentators also distinguish between pure questions of law and of fact and the so-called “mixed” questions of law and fact. A mixed question of law and fact is said to be found where the court is applying a legal concept to undisputed or established facts. (Davis, *supra* at § 245). Thayer believed that mixed questions of law and fact should be treated as matters of law. (See discussion of the views of these two commentators in Davis, *supra* § 245 at 875-876).

It is often necessary and useful to distinguish between certain types of questions of fact. Facts may be classified as evidentiary or ultimate; as constitutional and jurisdictional or ordinary.

There are two approaches which a court may take in determining whether a particular question is one of fact or of law—the analytical approach and the practical or policy approach. The following quotation from Professor Davis summarizes the two approaches:

“... One approach is the analytical, literal, or conceptual, which emphasizes logic and the layman's meaning of the words. The

other approach is the practical or policy approach, which assigns meanings to the terms largely on the basis of reasons of policy concerning allocation of functions between agencies and courts. A major source of confusion is the usual failure to differentiate between these two approaches. Courts and commentators usually instinctively think in terms of the analytical, but policy reasons are strongly felt and frequently impel results that cannot be explained by an exclusively analytical approach. The practical approach often provides the motivation for judicial classification but the opinions are customarily written in terms of the analytical, with a resulting appearance of illogicality. A more forthright acknowledgment that the practical approach often governs would tend to eliminate much of the confusion.” Davis *supra*, § 245 at p. 874.

[Scope of Judicial Review: Ordinary Fact]

The Report of the Attorney General's Committee on Administrative Procedure sets forth the generally accepted view of judicial review of administrative action as follows:

“In the language of judicial review sharp differentiation is made between questions of law and questions of fact. The former, it is uniformly said, are subject to full review, but the latter, in the absence of statutory direction to the contrary, are not, except to the extent of ascertaining whether the administrative finding is supported by substantial evidence.” *Id.* at 88 (1941).

Professor Jaffe, in the introduction to his series of articles, briefly summarizes the role of the courts in reviewing the decision of an administrative agency, saying:

“The distinction between fact and law is vital to a correct appreciation of the respective roles of the administrative and the judiciary. The administrative is the sole fact finder. The judiciary may set aside a finding of fact not adequately supported by the record, but, with certain exceptions, at that point its function is exhausted. It has, as it were, a veto but no positive power of determination. On the other hand, the administrative and the judiciary share the role of law pronouncing and law making...” 69 Harv. L. Rev. at 239.

[Basis for Findings of Fact]

The Supreme Court is quick to point out that the findings of fact of an administrative agency must be based on evidence. In *ICC v. Louisville and Nashville RR Co.*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913), the Court was faced with the problem of determining whether an order of the Commission was conclusive. The government contended that the order could not be overturned even if it was not supported by substantial evidence. The Court first held that findings of fact must be based on evidence; otherwise, they would be "arbitrary and baseless." The Court then went on to determine the extent to which it should re-examine the facts. It noted that the jurisdiction of the Commission in the case before it depended upon the fact that a rate fixed by a carrier was unreasonable, and then said,

"In a case like the present the courts will not review the Commission's conclusions of fact... by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.'" 227 U.S. at 92.

The Court then said that it was necessary "to examine the record with a view of determining whether there was substantial evidence to support the order." (227 U.S. at 94).

[The Substantial Evidence Rule]

The foregoing material has indicated that a reviewing court will not overturn a finding of fact by an administrative agency if that finding is supported by "substantial evidence." What is the concept of substantial evidence?

Several decisions of the Supreme Court have indicated what is meant by "substantial evidence." The reviewing court is not allowed merely to consider whether the record was wholly barren of evidence to support the administrative findings, and "substantial evidence is more than a mere scintilla." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938). The Court said in the *Consolidated Edison* case that substantial evidence "means such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion." (305 U.S. at 229). The orders of an administrative agency must have a "basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." 305 U.S. at 230. The evidence need not be conclusive, however, and the requirement is that the evidence "be such as a reasonable mind would accept, though other like minds would not do so." *International Ass'n of Machinists v. NLRB*, 110 F.2d 29, 35, *aff'd*, 311 U.S. 72, 61 S.Ct. 83, 85 L.Ed. 50 (1940).

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), the Supreme Court re-examined the substantial evidence rule to determine the effect which the Administrative Procedure Act [5 U.S.C.A. § 1009(e) (1952)] would have on the rule. Substantial evidence, according to the Court, "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." (340 U.S. at 477). The Court found that the enactment of the Administrative Procedure Act broadened the scope of review of administrative findings. The reviewing court was required not only to examine the evidence which justified the findings, but also "whatever in the record fairly detracts from its weight." (340 U.S. at 488). The court concluded:

"... The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special [competence] or both." 390 U.S. at 490.

Professor Jaffe expresses the idea that the reviewing court may take the requirement of "substantial evidence" on the whole record as establishing a "weight of evidence" test. He says:

"... [I]f the value or 'weight' of the evidence in support of an inference must be assayed in order to determine its substantiality, it is understandable that some judges may feel that they are called upon to 'weigh the evidence.' The judge must, therefore, be vigilantly aware of what he is doing and stop short of such an exercise of power. Once he has determined that there is a reasonable probability of the fact found

by the agency he is *functus officio*. It matters not that the whole record would support a contrary inference or that in the opinion of the court the contrary inference is more probable or even much more probable. The court may not weigh the worth of competing inferences. In the words of Mr. Justice Frankfurter a court may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' [*Universal Camera Corp. case, supra* at 488.] 69 Harv. L.Rev. at 1028.

In reviewing the findings of fact of an administrative agency, it is generally said that "a determination of credibility is nonreviewable unless there is uncontrovertible documentary evidence or physical fact which contradicts it." Jaffe, 69 Harv. L.Rev. at 1031. (For an extensive analysis of this notion, see 69 Harv. L.Rev. at 1031-1038.) Another element of the substantial evidence rule is the weight which should be given the "expertness" of an administrative agency. The *Universal Camera* case pointed out that some administrative agencies are "presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (340 U.S. at 488). (For a discussion of this factor see Jaffe, 69 Harv. L. Rev. at 1038-1040).

[Action Taken Without a Hearing]

When the administrative determination is *ex parte*, the reviewing court apparently will hold a *de novo* trial. The applicable rule has been stated as follows:

"*Findings of Fact.*—In reviewing administrative action taken without a hearing, the courts ordinarily review the administrator's findings of fact. In order to review these findings, evidence must be taken on all disputed issues of fact, since there is no adversary record upon which the court can rely. . . . The reviewing court must determine what standard shall be applied in deciding whether or not the evidence requires the acceptance of the administrator's findings of fact." Note, *Judicial Review of Administrative Adjudicatory Action Taken*

Without a Hearing, 70 Harv.L.Rev. 698, 699 (1957).

This problem was forcefully presented in *New Hampshire Fire Ins. Co. v. Murray*, 105 F.2d 212 (7th Cir. 1939). In that case the common council of a city ordered a building to be torn down under an ordinance requiring the destruction of a building which had been damaged by fire to the extent of 50% or more of its value. The insurer-plaintiff had not been given a hearing. The Court noted that an administrative hearing was not a prerequisite to the validity of the administrative action, but that the lack of a hearing "does and should affect the weight that is given to the administrative finding." (105 F.2d at 217). A *de novo* trial is said to be the general principle applicable to cases involving *ex parte* determination of administrative bodies. The weight which should be given the determination of the administrative agency is analyzed as follows:

"It does not follow necessarily that, because the plaintiff was entitled to a hearing on the merits in the district court, the *ex parte* determinations of the council should be disregarded. To what respect are the council's findings entitled? That they should carry some weight is undisputed. . . .

"... The council in our case made its determination *ex parte* and then refused to hear evidence offered by the plaintiff. Surely, under circumstances such as these, the administrative findings are not on a par with judicial findings, and are clearly not conclusive. There is a wide margin of difference, in our opinion, between an *ex parte* determination and an administrative adjudication based on a hearing. We cannot believe that more than *prima facie* correctness should be given to such administrative findings." 105 F.2d at 217.

The court noted that if there had been a hearing before the administrative body, the district court should apply the substantial evidence rule to the administrative findings. [See also *Columbia Auto Loan, Inc. v. Jordan*, 196 F.2d 568 (D.C. Cir. 1952)]

[Review of State Administrative Agencies]

The substantial evidence rule, with its various ramifications and qualifications, is applicable to federal review of factual determinations by state

administrative agencies. Apparently, no distinction is made between federal review of federal agencies and of state agencies except that required by the federal statutes such as the Administrative Procedure Act, *supra*.

New Hampshire Fire Ins. Co. v. Murray, supra, indicates that no distinction is normally made. That case dealt with the review of the findings of a state administrative body, and although the determination of the administrative agency was *ex parte*, the court indicated the procedure which was followed when a full hearing was given. "...[W]e are not unmindful that the principle ordinarily applied in reviewing administrative findings is that the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the administrative order." (105 F.2d at 215).

In *Railroad Commission of Texas v. Rowan and Nichols Oil Co.*, 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940), the defendant attacked an order of the Commission, formulating a method for the distribution of the total amount of oil which it allowed to be produced in the East Texas oil field among well owners, alleging that the Commission failed to take into account certain relevant facts and that the order discriminated against high-producing and thinly drilled areas. The federal district court enjoined the enforcement of the orders, and the Supreme Court reversed, saying:

"... Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary.... A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulations and execution of policy have been entrusted." 310 U.S. at 580-81.

The Commission modified its first order after the district court granted the injunction, and the case again reached the Supreme Court, 311 U.S. 570, 61 S.Ct. 343, 85 L.Ed. 358 (1941). In discussing the first decision, the court said it had rejected the arguments against the order "as an attempt to substitute a judicial judgment for the expert process invented by the state in a field so peculiarly dependent on specialized judgment." (311 U.S. at 573). The court continued:

"... We said in effect that the basis of present knowledge touching proration was

so uncertain and developing, that sounder foundations are only to be achieved through the fruitful empiricism of a continuous administrative process. Further, that ought not to be stifled by drawing from the generalities of the Constitution allegiance to one as against another speculative assumption even though delusively clothed in formal findings of fact." 311 U.S. at 573.

From all appearances the Court was applying the substantial evidence rule to the record from the state administrative agency.

A subsidiary problem arises when a factual determination by a state administrative agency is subsequently pleaded as a bar to federal action. This is illustrated in *Moore Oil, Inc. v. Snakard*, 150 F.Supp. 250 (W.D. Okla. 1957). In that case, an action to quiet title of certain oil property, the defendant contended that the jurisdictional amount was not involved, relying on the value of the disputed leasehold as fixed by the corporation commission in earlier proceedings. The plaintiff was also relying on the proceedings before the commission to establish his claim on the merits. The district judge said:

"This Court is charged with the duty of determining the facts upon which its jurisdiction, or want of it, is grounded. The findings of the Corporation Commission of Oklahoma, or of some other tribunal, cannot foreclose this Court's inquiry into the value of the subject matter of an action before it." 150 F.Supp. at 253.

[Constitutional or Jurisdictional Fact]

Some commentators and courts have distinguished between on ordinary and constitutional or jurisdictional facts. The former are those facts with which the foregoing material has been concerned. The latter may be said to be a fact which is the constitutional basis for the exercise of power by an administrative agency; in other words, the existence of the fact is a condition precedent to the agency's exercise of power.

The scope of judicial review of administrative findings of fact may well depend upon whether the fact is ordinary or constitutional or jurisdictional. Professor Jaffe has summarized the applicable rules as follows:

"... Judicial control of the finding of fact is limited to the inquiry whether there is

substantial evidence. This simple formulation, however, must be qualified by the so-called doctrine of *Crowell v. Benson* [285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932)]. We may state this doctrine tentatively as follows: When a fact is the asserted constitutional basis for the exercise of the power in question, the court must itself make a finding of fact and may in its discretion take evidence as to the fact." 70 Harv. L. Rev. at 953.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920), is a leading case which illustrates the doctrine of constitutional fact. The Company attacked an order of the state public service commission as confiscatory, alleging that their property was being taken without due process of law. The state supreme court held that the findings of the commission must be upheld if they were reasonable and within the discretionary powers of the Commission. The Supreme Court reversed:

"... In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." 253 U.S. at 289.

Two aspects of this case should be carefully noted. In the first place, the Court indicated that in cases involving an allegation of confiscation of property by an administrative agency, it could and would make independent findings of fact. Secondly, the Court held that in all such cases the state must provide a judicial tribunal for determining "upon its own independent judgment" certain facts crucial to due process.

The other leading cases on constitutional fact deal with federal administrative agencies rather than state agencies, and indicate, *inter alia*, that the same rule is applicable to both types of review. *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936); *Crowell v. Benson*, *supra*; *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938 (1922).

The *St. Joseph Stockyards* case explains, and to a certain extent, qualifies *Ben Avon*. An order of the Secretary of Agriculture fixing maximum rates for the stockyards company's services was

attacked as confiscatory. The court first noted that the fixing of rates was a "legislative act" and that a reviewing court should not substitute its judgment "for that of the legislature or its agents as to matters within the province of either." The legislature may provide that findings of fact of its agents are conclusive, "provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting under evidence and not arbitrarily." 298 U.S. at 50-51. However, there is a certain area within which the legislature cannot provide for finality of findings of fact:

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained.... Under our system there is no warrant for the view that [the] judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." 298 U.S. at 51-52.

This amounted to a restatement of the *Ben Avon* doctrine, but important qualifications were added:

"... [T]he judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden

reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests." 298 U.S. at 53.

The court also pointed out that there was a presumption in favor of conclusions reached by an expert administrative agency and that the burden of proof on the issue of confiscation was on the complaining party.

Mr. Justice Brandeis concurred in the result, but held a different view on the question whether the court must make independent findings of fact:

"Like the lower court, I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct; but that the trier of facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed." 298 U.S. at 73.

He discussed the requirements of due process and of "supremacy of law." Due process requires that a party must have the opportunity of presenting to some court "every question of law raised, whatever the nature of the right invoked or the status of him who claims it." 298 U.S. at 77. The requirements of "supremacy of law" were stated as follows:

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of

law is to be applied shall be subject to review by a court." 298 U.S. at 84.

The *Ng Fung Ho* case involved review of an order of the Department of Labor, ordering certain persons deported as deportable aliens. The opinion of the Court, written by Mr. Justice Brandeis, talked in terms of jurisdictional fact. "Jurisdiction in the executive to order deportation exists only if the person is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact." (259 U.S. at 284). The court proceeded to say that the judiciary must re-examine and make an independent determination on this question of fact.

In the *Crowell* case, Benson sought to enjoin enforcement of a workmen's compensation award under the Longshoremen's and Harbor Workers' Act, made by Crowell, a deputy commissioner, on the ground that Knudson, the person to whom the award was granted, was not his employee. The district court found that Knudson was not the employee of Benson and enjoined the enforcement of the award. In discussing whether the findings of fact of the deputy commissioner were final, the court distinguished between ordinary facts and jurisdictional facts. As to the finality of jurisdictional facts, the Court said:

"In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of constitutional rights of the citizen depend. The recognition of [the] utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that [The] Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its

own instrumentalities or in the Executive Department." 258 U.S. at 56-57.

The court went on to say that whenever a case was brought to enforce constitutional rights, "the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." (258 U.S. at 60).

The status of these cases on constitutional facts, with the exception of *Ng Fung Ho*, is very uncertain. Professor Davis maintains that "the *Ben Avon* doctrine has gradually died. Various decisions since 1940 depart sharply from the doctrine." (*supra*, § 255). *Rowan and Nichols*, *supra*, is cited in support of this notion. It should be noted, however, that the Supreme Court was careful to avoid the use of the term "confiscation" in that case, and there is some question whether it indicates that the Supreme Court will refuse to follow *Ben Avon*. Professor Jaffe notes that in the *Rowan and Nichols* case, "the issue was not strictly one of fact but of judgment or discretion on the facts." (70 Harv. L. Rev. at 981). Some significance may be attached to the fact that the state courts have almost unanimously upheld the *Ben Avon* doctrine. Professor Davis states that the state courts of New York and Massachusetts have applied the doctrine under the state constitutions (*supra*, § 255), but the answer is not as simple as that. Professor Jaffe is quick to point out the real problem:

"In recent years a number of state courts have been asked to answer the question whether the *Ben Avon* doctrine is still alive.

Practically all of them have held that it is The question for a state court arises under both the state and federal due process clauses. It is not always possible to determine whether a decision is based on one or the other or both." 70 Harv. L. Rev. at 981.

Further, the Supreme Court has had many opportunities to expressly overrule *Ben Avon*, according to Jaffe, but has failed to do so. "It is as if the Court had concluded that it would be wise to retain the case in its armory of implements against the day when some exceptional situation might demand its application." 70 Harv. L. Rev. at 984.

The doctrine of *Ng Fung Ho*, however, has endured. According to Professor Davis, this can be explained as follows:

"... That the *Ng Fung Ho* doctrine has endured while the doctrine of the *Ben Avon* and *Crowell* cases has disappeared is best explained in terms of the Supreme Court's view that personal liberty is entitled to greater protection than rights of property. (*supra*, § 255).

It is possible that the *Ng Fung Ho* and *Ben Avon* cases may be combined by the Supreme Court in race relations and civil rights cases to enable federal courts to re-examine the factual determinations of state administrative agencies. This is particularly likely in view of the Supreme Court's great regard for personal liberty. Indeed, race relations and civil rights cases may well provide the "exceptional situation" which Professor Jaffe says "might demand its application." 70 Harv. L. Rev. at 984.)

II. Federal Habeas Corpus Proceedings

The question whether a federal court will re-examine factual determinations of state courts often arises in federal habeas corpus proceedings. Indeed, habeas corpus proceedings are peculiarly suited to raise the question, for, in the first place, as a general rule the denial of a petition for the writ is not *res judicata*—that is, the refusal of one court to discharge a prisoner under one writ of habeas corpus is not a bar to the issuance of another writ, although based on the same state of facts. 25 Am. Jur., Habeas Corpus § 156 (1940). Further, the federal petitioner must have exhausted his state remedies

prior to bringing his petition in the federal courts. 28 U.S.C.A. § 2254 (1950); *Exhaustion of State Judicial Remedies*, 2 Race Rel. L. Rep. 1215 (1957). This requirement will often demand that the federal petitioner present a petition for the writ to an appropriate state court prior to seeking relief in the federal courts, and in this manner the factual determination of a state court will find its way into the federal courts.

It should be noted that it is often difficult to determine whether the federal courts are discussing the findings of fact or the conclusions of

law of the state court. The terms used are often vague and all-inclusive—e.g., “merits” or “state adjudication.”

[*State Court Decisions on Law and Fact*]

The conclusiveness of factual determinations is only one part of the much larger problem of the weight which should be given the decisions of the state courts. In this connection, the general rule in habeas corpus proceedings has been stated as follows:

“...It is true that where a state court has considered and adjudicated the merits of a petitioner’s contentions, and this Court has either reviewed or declined to review the state court’s decision, a federal court will not ordinarily [reexamine] upon writ of habeas corpus the questions thus adjudicated.” *House v. Mayo*, 324 U.S. 42, 48, 65 S.Ct. 517, 89 L.Ed. 739 (1945). See also, *White v. Ragen*, 324 U.S. 760, 764, 765, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); *Ex parte Hawk*, 321 U.S. 114, 118, 64 S.Ct. 448, 88 L.Ed. 572 (1944).

[*Determinations of Fact*]

A searching analysis of the extent to which a state court’s determinations of fact should be given effect by a federal court may be found in *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). First, the court considered the question whether the state court’s determination was *res judicata*:

“...A *fortiori*, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. [citations omitted]. Furthermore, where there is a material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state’s resolution of the issue. [citations omitted]. In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*.” 344 U.S. at 458.

It is possible that this broad language would cover other proceedings in which a federal constitutional issue is raised.

The remainder of the opinion discusses the weight which must be given to the state court’s determinations and the practice which the federal courts should follow in determining whether the federal constitutional rights have been protected:

“...Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or laws a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice...As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post conviction remedies.” 344 U.S. at 464-65.

Mr. Justice Frankfurter wrote a clarifying opinion on the weight to be given factual determinations of state courts. The state determination should be considered in defining “the claim urged in the application for the writ and may bear on the seriousness of the claim.” Further, “the prior state determination may guide his discretion in deciding upon the appropriate course to be followed in disposing of the application before him.” 344 U.S. at 500. He continued:

“...In some cases the State court has held a hearing and rendered a decision based on specific findings of fact; there may have been review by a higher State court which had before it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases.” 344 U.S. at 504.

The proper procedure to be followed by the district courts was then outlined, and two of the rules commented upon illustrate federal practice with regard to state court determinations of fact:

"FOURTH. When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide." 344 U.S. at 506.

"FIFTH. Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, [citations omitted] the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." 344 U.S. at 507.

The conclusions to be drawn from this analysis by the Supreme Court are relatively clear. In habeas corpus proceedings, the federal courts have wide discretionary powers. Although the state court's findings of fact are not conclusive or binding on the federal judge, it is within the permissible bounds of his discretionary powers for him to adopt the findings of fact of the state court. The federal court, however, must at least consider the state court's factual determinations, giving them such weight and credence as comity requires.

[Factual Determinations]

The lower federal courts have often been called upon to decide the question of whether the state court's determination of fact is binding. There seems to be general agreement on the notion that the state adjudication is not res judicata in federal habeas corpus proceedings. There may be some differences on the weight which should be accorded the findings of fact.

It should be noted that the difficulty of determining whether the federal court is referring to

questions of fact or law is equally applicable to the decisions of the lower federal court opinions. The discussion is often in terms of "merits" or the "state adjudication," and frequently it is not clear whether these terms are used to include the state court's factual determinations.

[Res Judicata]

Apparently, the circuits are agreed that the dismissal of a previous habeas corpus petition by a state court is not res judicata, although based on the same facts. *Gault v. Burford*, 173 F.2d 813 (10th Cir. 1949); *Collingsworth v. Mayo*, 173 F.2d 695 (5th Cir. 1949); *Rose v. Mangano*, 111 F.2d 114 (2d Cir. 1940).

In the *Collingsworth* case, which involved a claim that petitioner had been denied right to counsel, the Fifth Circuit said:

"Neither a general res judicata nor an estoppel by judgment as to particular facts found by the Florida court, particularly that *Collingsworth* was in fact represented by counsel, ought to be recognized, though the argument of that court seems fair and well reasoned." 173 F.2d at 697.

[Weight Given to Factual Determinations]

In determining whether the court will, in the exercise of its discretion, grant or deny the petition for a writ of habeas corpus, the federal courts will give some weight to the state court's findings of fact. In *Gault v. Burford*, *supra*, the court said that the factual adjudications of the state court, while not "strictly res judicata," were to be given "great weight and credence in determining whether, in the last analysis, the petitioners had been accorded due process in the state courts." 173 F.2d at 814-815).

The weight which should be given the factual determinations of the state court is not clear. As noted above, the Tenth Circuit has said that the factual determinations are entitled to "great weight and credence." It concluded that "any other procedure would require the Federal Courts to retry every criminal case in the state courts, where due process is challenged." (173 F.2d at 814-815). Other courts have said substantially the same thing. See *United States ex rel. Firmstone v. Day*, 220 F.2d 746 (3d Cir. 1955); *United States ex rel. Wright v. Myers*, 142 F. Supp. 387 (E. D. Penn. 1956); *United States ex rel. Lawson v. Skeen*, 145 F. Supp. 776 (N. D. W.Va. 1956).

In the *Wright* case, the Court said that "the ruling of the State Court is entitled to consideration and respect if the relator was afforded a real opportunity to present his case in that forum." (142 F.Supp. at 388). The court went on to say that since the state court had found against the relator on the facts, sound discretion did not require the district court "to duplicate the record made in the State Court in order to determine that issue." (*Id.* at 389). In the *Lawson* case, the court took much the same approach, as indicated by the following quote:

"Moreover, it appears to be the general rule that where the highest court of the state has pronounced a decision on the merits of a case, denying a writ of habeas corpus, and the Supreme Court of the United States has denied a writ of certiorari, a Federal District Court may properly decline, without rehearing the facts, to award a writ of habeas corpus to a state prisoner in the absence of unusual circumstances." (145 F.Supp. at 779).

Another case which may indicate substantially the same notion, although it is difficult to determine whether the court is talking in terms of questions of fact, is *Presley v. Peppersack*, 227 F.2d 325 (4th Cir. 1955). The court there said:

"As the questions which appellant sought to raise by habeas corpus had been adequately considered and properly decided by the courts of the state, the court below was not required to issue the writ." (227 F.2d at 326).

On the other hand, some courts seem to feel that the prior state adjudication of the facts requires a dismissal of the writ of habeas corpus unless some exceptional or unusual circumstances exist. See *Simpson v. Teets*, 239 F.2d 890 (9th Cir. 1956), which would seem to indicate that this is the correct notion. This view is given a full presentation in *Stonebreaker v. Smyth*, 163 F.2d 498 (4th Cir. 1947), decided prior to *Brown v. Allen*, *supra*. There the Fourth Circuit analyzed the whole problem as follows:

"We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of

petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of *res judicata*, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court had refused to review their action on certiorari." 163 F.2d at 499.

The Fourth Circuit's opinion in *Presley v. Peppersack*, *supra*, may indicate a change as to the view that the state adjudication is entitled to great weight, but will not require the federal court to dismiss the action.

The difficulty of determining whether the federal court in referring to questions of fact or law is illustrated by *Ex parte Graham*, 132 F.Supp. 69 (S.D. Calif. 1955). The Court referred to the "final judgment of state courts," saying:

"Except in rare cases, federal courts do not sit in judgment as appellate courts over the final judgment of state courts. Whatever power of review they exercise is strictly delimited. Respect for the jurisdiction of state courts would be destroyed entirely if we permitted a litigant, even one condemned to death, to relitigate by writ of habeas corpus questions properly determined by the state courts, the final judgment of which the Supreme Court of the United States on certiorari has declined to disturb,—upon nebulous and federally unfounded assertions of denial of due process." 132 F.Supp. at 71-72.

REFERENCE

Federal Judicial Power: A Study of Limitations

IV. Enjoining State Court Proceedings*

By the practice of voluntary abstention from interference in some types of state proceedings, the federal courts have avoided many conflicts which could be expected to arise in a federal system of government with dual sovereignties extending over the same geographical territory. See *Exhaustion of State Judicial Remedies*, 2 *Race Rel. L. Rep.* 1215, 1222-1231 (1957). Congress has also acted to prevent clashes of judicial authority in certain situations, as is evidenced by the limitation created by the 1948 statute on the power of federal courts to grant writs of habeas corpus. *Ibid.*, 1219-1222. Further, the friction inherent in the power of federal courts to interfere by injunction with the administration of justice in the state courts was recognized by Congress at the very inception of the American federal system. For this reason the Act of 1793, 1 Stat. 333 (1793), amending 1 Stat. 73 (1789), which first expressly empowered federal courts to issue writs of injunction, also placed upon this power several limitations, one of which was: "nor shall a writ of injunction be granted to stay proceedings in any court of a state." [See 62 Stat. 968 (1948), 28 U.S.C.A. § 2283 (1950), *infra*, for the present form of this statute.] It would appear that the federal courts were ab-

solutely forbidden to enjoin litigation in the state courts, but such has not been the interpretation and application of this provision. The history of its application is marked by the development of judicially-created "exceptions" to the limitation, most of which appear to be irreconcilable with the statutory language.

Although the prohibition might be interpreted to forbid only injunctions directed to state courts and their officers, it seems well-established that a federal court may not order a state court litigant to refrain from prosecuting his action. *Hill v. Martin*, 296 U.S. 393, 56 S.Ct. 278, 80 L.Ed. 293 (1935). Furthermore, the term "proceedings" has been interpreted to include not only actual suits but also all judicial steps taken to enforce judgments. *Ibid.* But when a state confers upon its courts powers which are not strictly judicial in nature, the federal courts are not forbidden to enjoin such non-judicial proceedings. See *Public Serv. Co. v. Corboy*, 250 U.S. 153, 39 S.Ct. 440, 63 L.Ed. 905 (1919). Moreover, a federal court may enjoin any proceedings of a non-judicial body of a state, even when the proceeding to be enjoined is itself judicial in nature. See *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 14 S.Ct. 1047, 38 L.Ed. 1014 (1894).

Early Application of the Act of 1793

The first case to apply the limitation contained in the Act of 1793—though the court did not mention the Act—was *Diggs & Keith v. Wolcott*, 8 U.S. (4 Cranch) 179, 2 L.Ed. 587 (1807), in which a bill in equity filed in a state court to

enjoin an action at law in another court of the same state was removed to a federal circuit court. The Supreme Court held that the circuit court lacked jurisdiction to enjoin the proceedings at law in the state court. In 1856 the court,

* See previous articles in this series: 2 *Race Rel. L. Rep.* 561, 757, 1215.

again, without mentioning the Act, reached the same result in a similar case. See *Orton v. Smith*, 59 U.S. (18 How.) 263, 15 L.Ed. 393 (1856). It was not until 1872, however, that the next decision, expressly citing the statutory limitation,

was rendered. In that year, in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1872), it was held that a federal court might not enjoin the enforcement of a state chancery decree.

Judicial Broadening of the Power to Enjoin State Court Proceedings

Watson v. Jones, *supra*, marked the beginning of a period of more active litigation involving the Act of 1793; since then many cases have applied the statutory limitation to prohibit the enjoining of state court actions. See, e.g., *Essanay Film Mfg. Co. v. Kane*, 258 U.S. 358, 42 S.Ct. 318, 66 L.Ed. 658 (1922); *Hull v. Burr*, 234 U.S. 712, 34 S.Ct. 892, 58 L.Ed. 1557 (1914); *Lawrence v. Morgan's Louisiana & T. R. & S.S. Co.*, 121 U.S. 634, 7 S.Ct. 1013, 30 L.Ed. 1018 (1887); *Haines v. Carpenter*, 91 U.S. 254, 23 L.Ed. 345 (1876).

To Protect Federal Court Jurisdiction

At the same time the federal courts began to find situations to which the limitation was held inapplicable. From unnecessarily broad language employed in several early cases, See, e.g., *Peck v. Jenness*, 48 U.S. (7 How.) 611, 624, 12 L.Ed. 841, 846 (1849), the notion developed that a federal court might enjoin state court proceedings when necessary "to protect its jurisdiction." This idea apparently had its inception in the rule that when one court has acquired possession of a *res* involved in litigation, another court, as a matter of comity, should not interfere with the first court's possession of the *res*. Relying upon the language rather than the holdings of these early cases, the Supreme Court later indicated that a federal court might enjoin a state court proceedings involving any dispute the subject matter of which was pending before the federal court, even though the action in the latter court was *in personam* and the possession of a *res* was not involved. *Looney v. Eastern Texas R.R.*, 247 U.S. 214, 38 S.Ct. 460, 62 L.Ed. 1084 (1918); *French v. Hay*, 89 U.S. (22 Wall.) 250, 22 L.Ed. 857 (1874). Furthermore, since a state court was said to lose all jurisdiction of a suit properly removed to a federal court, the latter was allowed to protect its jurisdiction of the removed action by enjoining any further

proceedings in the state court. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905). See *Dietzsch v. Huidekoper*, 103 U.S. 494, 26 L.Ed. 497 (1881).

To Prevent Re-litigating Issue

Still another exception to the limitation contained in the Act of 1793 was developed from the decision in *Julian v. Central Trust Co.*, 193 U.S. 93, 24 S.Ct. 399, 48 L.Ed. 629 (1904). In that case the federal district court had previously decreed a mortgage foreclosure and had confirmed a sale of the mortgaged land. The Supreme Court upheld an injunction restraining judgment creditors of the ex-mortgagor from enforcing their judgments against this land. Such an injunction was said to be necessary to effectuate the prior federal decree and protect the jurisdiction retained by the district court to assure to the purchaser his interest in the land. From the reasoning of this case, the notion was later developed that state courts might be enjoined from "relitigating" issues already settled in federal court actions, in order to protect and effectuate the prior federal decrees. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921). Cf. *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934); *Dietzsch v. Huidekoper*, *supra*. *Contra*, *Dial v. Reynolds*, 96 U.S. 340, 24 L.Ed. 644 (1877).

To Effectuate Discharge in Bankruptcy

At one stage Congress wrote an exception into the statute, permitting federal courts to enjoin state court proceedings "... in cases where such an injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. Stat. § 720 (1875). However, that provision was deleted in the re-enactment of the statute in

1948 as 62 Stat. 968 (1948), 28 U.S.C.A. § 2283 (1950), and a more generalized exception was substituted, permitting a federal court to issue injunctions "... as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (See discussion, *infra*.) Acting independently of the 1875 exception the federal courts have seemingly created a qualification to the statute as a part of their bankruptcy jurisdiction. When a creditor sues in a state court to enforce an obligation which the debtor contends was discharged in bankruptcy, the bankruptcy court possesses the discretionary power to enjoin the state proceeding and determine the issue of whether the obligation in question was covered by the discharge in bankruptcy. The Supreme Court first gave its sanction to such action in *Local Loan Co. v. Hunt*, *supra*, where the basis of the power was explained as follows:

"The pleading by which respondent invoked the jurisdiction of the bankruptcy court in the present case is in substance and effect a supplemental and ancillary bill in equity, in aid of and to effectuate the adjudication and order made by the same court. That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well-settled." 292 U.S. at 239.

The court went on to observe that the suit to enjoin the state proceedings may be maintained "notwithstanding the provisions of [28 U.S.C.A. § 2283]"—which at that date still contained the express bankruptcy exception. See also, *Holmes v. Rowe*, 97 F.2d 537 at 540 (9th Cir. 1938); *State Finance Co. v. Morrow*, 216 F.2d 676 at 679 (10th Cir. 1954) (acting under the "... discretionary authority of the bankruptcy court to ... enjoin any threatened interference with the integrity of its decree of discharge.")

To Prevent Enforcement of Void Judgments

The judicial creation of exceptions to the statutory limitation did not end with the upholding of injunctions thought to be necessary to protect federal court jurisdiction and decrees. Another breach in the limitation was brought

about in *Marshall v. Holmes*, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891), in which the Supreme Court held that federal courts might enjoin the enforcement of fraudulently obtained judgments in the state courts. This exception was later extended to include injunctions restraining the enforcement of other types of "void" judgments, such as those for which proper service of process was lacking. See *Simon v. Southern Ry.*, 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492 (1915). In the *Simon* case the court reasoned that issuing of the injunction was "inevitable, or else the Federal court must hold that a judgment—void for want of service—is 'a proceeding in a state court' even after the pretended litigation has ended and the void judgment has been obtained." It may be argued, however, that the court was in error in reasoning that the "proceeding" to be enjoined was the void judgment or the invalid action in which it was rendered, rather than the valid proceeding to enforce the judgment.

To Prevent Enforcement of Unconstitutional Statute

In several cases the Supreme Court has held that a federal court may enjoin the institution of state court proceedings to enforce unconstitutional state statutes. See *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). These cases raise the question—as yet apparently unanswered—of whether the statutory limitation ever forbids a federal court to enjoin the institution of state court proceedings, as distinguished from the restraint of proceedings already commenced. It cannot be doubted that less friction between the courts is created when the state court is deprived of jurisdiction of an action which has not yet been commenced and of which the state court may be unaware than is created by depriving the state court of jurisdiction of a case already before it for determination. At least one lower federal court has recently indicated that the statutory limitation applies only to actions already commenced in the state courts. See *American Houses, Inc. v. Schneider*, 211 F.2d 881 (3rd Cir. 1954). The difference, however, is one of the degree of friction engendered, and it is still open to argument that the statutory limitation should be applied to both prospective and pending cases.

Judicial Restricting of Power to Enjoin State Court Proceedings

It would seem that in most instances the injunctions upheld by the Supreme Court were the very types which the limitation contained in the Act of 1793 was designed to prohibit. Nevertheless, the only justification ever offered by the court consisted of statements to the effect that a particular injunction was necessary to the effectiveness of federal jurisdiction or that an injunction aided the very purpose of the Act by preventing friction between the court systems. See *French v. Hay*, 89 U.S. (22 Wall.) 250, 22 L.Ed. 857 (1874); *Looney v. Eastern Texas R.R.*, 247 U.S. 214, 38 S.Ct. 460, 62 L.Ed. 1084 (1918).

The recognition of these judicially-created exceptions continued well into the present century: In 1922, however, the Supreme Court revealed a change in its attitude toward them. In that year *Kline v. Burke Constr. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922), placed a restriction on the power of a federal court to enjoin a state court action to protect its jurisdiction. The plaintiff construction company had brought an *in personam* action in a federal district court for breach of contract. Shortly thereafter defendant had filed a bill in a state chancery court upon the same contract. After a mistrial of the federal action, plaintiff filed in the federal court a dependent bill to enjoin defendant from further prosecution of his suit in the state court. The Supreme Court held that such an injunction was prohibited. While recognizing an exception to the statutory limitation where an injunction is necessary to protect the jurisdiction of the federal court, the court pointed out that jurisdic-

tion of an *in personam* action is not impaired by a suit in another court on the same issues. The conclusion was reached that such an injunction would be upheld where the action was *in rem* but not where it was *in personam*.

A far more severe restriction of the judicially-created exceptions was brought about in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941). In this case an action for breach of contract, commenced in a state court and properly removed to a federal district court, had been dismissed by the latter on the merits. Subsequently, the plaintiff in the prior action brought another suit in a state court on the same cause of action. The defendant insurance company sought an injunction in a federal court to restrain prosecution of the action in the state court, but the limitation contained in the Act of 1793 was held to prohibit a federal court from protecting its decree by enjoining relitigation of the same issues in a state court. The Supreme Court was not content with merely disaffirming the "relitigation" exception. In extensive dictum, purporting to discuss the entire history of the application of the Act of 1793, the court showed disfavor for judicially-created exceptions to the limitation contained in the Act. Aside from certain "statutory exceptions," it indicated approval of such an exception only for injunctions necessary to protect jurisdiction of an *in rem* action or of an action properly removed to a federal court; the latter, moreover, were approved solely on the ground that the various removal acts were, by implication, amendments to the Act of 1793.

Section 2283 of the Judicial Code

At the time of its decision, the *Toucey* case appeared to establish a new foundation for future developments in the application of the statutory limitation contained in the Act of 1793. In it the court gave notice that the limitation would be strictly applied. Congress, however, appears to have nullified the holding and possibly much of the dictum in the *Toucey* case. Section 2283 of the Judicial Code, 62 Stat. 968 (1948), 28

U.S.C.A. § 2283 (1950), enacted in 1948 and embodying the latest amendment to the original statutory limitation, provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

To Protect Judgments

The Revisor's Note to section 2283 states that the amendments are intended to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision." It is indicated that the phrase "to protect or effectuate its judgments" is designed to restore the "relitigation exception" and thus nullify the *Toucey* holding. No case involving this phrase has yet reached the Supreme Court, but several lower court decisions indicate that the intended result has been accomplished. See *e.g.*, *Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952); *Jackson v. Carter Oil Co.*, 179 F.2d 524 (10th Cir. 1950).

In Aid of Jurisdiction

The words "where necessary in aid of its jurisdiction" appear to present a more troublesome question of interpretation. The Revisor's Note states that "the phrase 'in aid of its jurisdiction' was added . . . to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts." It is thus clear that the federal courts are now expressly authorized to enjoin state court proceedings where necessary to protect their jurisdiction of removed cases. Although the Revisor's Note does not indicate that the phrase "in aid of its jurisdiction" was incorporated into section 2283 for the purpose of authorizing injunctions to protect jurisdiction of original actions, it is quite possible that the Supreme Court will so interpret the phrase, at least in regard to *in rem* actions. The existence of such a judicially-created exception for *in rem* actions had been reaffirmed in both the *Kline* and *Toucey* cases. It should be noted, moreover, that several lower courts have interpreted this phrase as authorizing the protection of original jurisdiction in this manner. See *e.g.*, *City of Fresno v. Edmonston*, 131 F.Supp. 421 (S.D. Cal. 1955); *De Korwin v. First Nat'l Bank*, 136 F.Supp. 720 (N.D. Ill. 1955). Nor is it altogether clear that the Supreme Court will adhere strictly to the distinction drawn in the *Kline* case between *in rem* and *in personam* actions. See p. 828, *supra*. It is quite arguable that the true rationale of the *Kline* case is to uphold injunctions in aid of jurisdiction whenever state court proceedings actually threaten federal court jurisdiction, whether or not the federal court action is *in rem*. Several lower courts have indicated that such injunctions

will be granted even in actions *in personam* if "such restraint is absolutely necessary to preserve the integrity of the Federal court's jurisdiction." *Lyons v. Westinghouse Electric Corp.*, 109 F. Supp. 925 (S.D.N.Y. 1952). *Cf. United States v. Western Pennsylvania Sand & Gravel Ass'n*, 114 F.Supp. 158 (W.D. Pa. 1953).

As Authorized by Act of Congress

As pointed out above, the *Toucey* decision recognized certain "statutory exceptions" created by statutes enacted subsequent to the Act of 1793 and thus constituting implied amendments to the Act. Some of these statutes expressly authorize federal courts to enjoin state court proceedings, while others merely give the federal courts exclusive jurisdiction of a certain area of litigation. Section 2283 obviously recognizes the statutory exception, but it is not clear whether the words "except as expressly authorized by Act of Congress" mean that the statute must expressly authorize the issuance of injunctions or whether the exception also includes within its scope those statutes which merely give the federal courts exclusive jurisdiction. The Supreme Court has held that the fact of exclusive federal jurisdiction does not bring a case within this express exception to section 2283 where the exclusive jurisdiction has been vested in an administrative board, and the district court itself has no jurisdiction of the case. *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 75 S.Ct. 452, 99 L.Ed. 600 (1955). But when such an administrative agency itself seeks an injunction in the federal courts to restrain state court encroachment upon this area of exclusive jurisdiction, such an injunction is allowed as "necessary in aid of" the exclusive federal jurisdiction. *Capital Service, Inc. v. NLRB*, 347 U.S. 501, 74 S.Ct. 699, 98 L.Ed. 887 (1954). Several lower federal courts have held that the phrase "in aid of its jurisdiction" does not empower federal courts to enjoin state court encroachment upon areas in which Congress, by "preempting the field," has given exclusive jurisdiction to the federal courts. See *H. J. Heinz Co. v. Owens*, 189 F.2d 505 (9th Cir. 1951); *International Union of Operating Engineers v. William D. Baker Co.*, 100 F.Supp. 773 (E.D. Pa. 1951). Apparently, however, neither of these cases considered the effect of the phrase "except where expressly authorized by Act of Congress." Whatever the interpretation given

these words of exception, it is clear that Congress may create further specific exceptions to the limitation without direct amendment of section 2283.

Although the Supreme Court has not considered the effect of section 2283 on injunctions to restrain state court enforcement of "void" judgments, the future validity of such injunctions is unlikely. The *Toucey* dictum certainly cast grave doubts as to the continued recognition of such a judicially-created exception to the limitation. See 314 U.S. at 136. Some indication might be derived from the Revisor's Note, which states that the purpose of section 2283 is to restore the law to its pre-*Toucey* status. The court has indicated, however, that the express exceptions in section 2283 will be construed to exclude all other exceptions to the statutory limitation. See *Amalgamated Clothing Workers v. Richman Bros. Co.*, *supra*. It was expressly pointed out that the above-mentioned statement in the Revisor's Note does not have the broad effect of restoring all judicially-created exceptions recognized prior to the *Toucey* decision. 348 U.S. at 515, n.l.

The majority of the court in the *Richman* case appears to have been desirous of emphasizing its conviction that the policy against enjoining state court proceedings should be rather strictly applied. Thus, it was declared:

"By that enactment [section 2283], Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation . . .

"In the face of this carefully considered enactment, we cannot accept the argument . . . that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress'. No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." 348 U.S. at 514-516.

Such expressions regarding the statute led the dissenting justices to observe:

"Contrary to the suggestion of the majority opinion, § 2283 is not broader in scope than its predecessor, § 265. Indeed, the express purpose of § 2283 was to contract—not expand—the prohibition of § 265."

Injunctions Sought By the United States

There has been some question as to whether section 2283 and its predecessors were applicable to injunctions sought by the United States or federal agencies. Several lower courts have held that the limitation does not apply to such injunctions. See, e.g., *Brown v. Wright*, 137 F.2d 484 (4th Cir. 1943); *United States v. McIntosh*, 57 F.2d 573 (E.D. Va. 1932), *United States v. Inaba*, 291 Fed. 416 (E.D. Wash. 1923). *Contra*, *United States v. Land Title Bank & Trust Co.*, 90 F.2d 970 (3rd Cir. 1937). Until very recently this question had not been settled by the Supreme Court; in the few cases involving the question which had reached that court, other reasons had been found for granting or denying the injunction. See, e.g., *Fleming v. Rhodes*, 331 U.S. 100, 67 S.Ct. 1140, 91 L.Ed. 1368 (1947); *United States v. Parkhurst-Davis Co.*, 176 U.S. 317, 20 S.Ct. 423, 44 L.Ed. 485 (1900). The court has, however, squarely decided this question in the recent case of *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed. 267 (1957), in which petitioner was seeking, in a state court action, to have itself declared owner of mineral rights in land owned by the United States, as against the latter's lessee of these rights. The United States brought action in a federal district court to quiet title to the mineral rights and to enjoin further proceedings in the state court. The injunction was granted despite section 2283, and the court of appeals and the Supreme Court affirmed, holding that section 2283 does not apply to injunctions sought by the United States. In reaching this result the Supreme Court relied upon the rule of construction that a statute which deprives persons of rights and remedies should not be applied to divest the sovereign of these rights and remedies unless required by the words of the statute. *Cf. United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 22 L.Ed. 80 (1873). Although it recognized that section 2283 was designed to avoid friction between federal and state judiciaries, the court found that this policy was less compelling when

the United States, rather than a private litigant, was seeking to enjoin the state court proceedings, and concluded that the general language of the section did not justify its application to this

situation in view of "the frustration of superior federal interests that would ensue . . ." *Leiter Minerals, Inc. v. United States, supra*, 352 U.S. at 226.

TABLE OF CASES

Cumulative, 1959

IN THIS LISTING, the official style of each case in the three 1959 issues and its citation, if any, appear in *italic* type. The reverse citations are in Roman type. A complete table of cases for the first two volumes of RACE RELATIONS LAW REPORTER appears at 2 Race Rel. L. Rep. 1233, and a complete table of cases for Volume Three appears at 3 Race Rel. L. Rep. 1301.

<i>Aaron v. Cooper</i> , USDC, ED Ark., 169 F.Supp. 325	IV: 17	<i>Almond; James v.</i>	IV: 46
<i>Aaron v. McKinley</i> , USDC, ED Ark., 169 F.Supp. 325,	IV: 17	<i>American Jewish Congress v. Carter et al.</i> , N.Y. Supreme Ct, Spec. Term, N.Y. County, Pt. 1, 190 N.Y.S.2d 218	IV: 630
USDC, ED Ark., Western Div., 173 F.Supp. 944	IV: 543	<i>Application of Association for Preservation of Freedom of Choice, Inc.</i> , N.Y. Supreme Ct., Special Term, Queens County, Part II, 187 N.Y.S.2d 706;	
<i>Docketed</i> , USSC, Oct. 13, 1959	IV: 541	188 N.Y.S.2d 885	IV: 690
<i>Abrams; Application of Lake Placid Club, Inc., v.</i>	IV: 159 712	<i>Application of Lake Placid Club, Inc., v. Abrams</i> , 180 N.Y.S.2d 254	IV: 159
<i>Ackley-Maynes Co., Inc.; New York SCAD v.</i>	IV: 358	Ct of Appeals of N.Y., 188 N.Y.S.2d 561, 6 N.Y.2d 857,	
<i>Alabama, State of; Flowers v.</i>	IV: 728	160 N.E.2d 92	IV: 712
<i>Alabama, State of; United States v.</i>	IV: 322 624	<i>Arkansas, State of, ex rel. Bruce Bennett; NAACP v.</i>	IV: 14 142
<i>Alabama, State of; Washington v.</i>	IV: 730	<i>Arkansas, State of; NAACP v.</i>	IV: 14
<i>Alabama ex rel. Patterson; NAACP v.</i>	IV: 538	<i>Arlington County, Virginia, School Bd of; Thompson v.</i>	IV: 609
<i>Alexandria, School Bd of; Jones v.</i>	IV: 29	<i>Armwood v. Francis</i> , Supreme Ct. of Utah, 340 P.2d 88	IV: 709
<i>Allen et al. v. School Bd of City of Charlottesville, Va. et al.</i> , USCA, 4th Cir., 263 F.2d 295	IV: 39	<i>Arnold et al; Hunt et al. v.</i>	IV: 79
<i>Allen et al. v. School Bd of Prince Edward County, Va.</i> , USCA, 4th Cir., 266 F.2d 507	IV: 297	<i>Association for Preservation of Freedom of Choice; Application of</i>	IV: 690
<i>Stay denied</i> , USSC, 79 S.Ct. 1443	IV: 256	<i>Atlanta, City of, et al., Members of Bd of Ed of; Calhoun et al. v.</i>	IV: 576
<i>Cert. denied</i> , USSC, Oct. 12, 1959	IV: 538	<i>Bailey v. Henslee</i> , USDC, ED Ark., 168 F.Supp. 314	IV: 170
<i>Allen et al; School Bd of City of Charlottesville v.</i>	IV: 39	<i>Barnes et al; State Tax Commission v.</i>	IV: 347
<i>Allen et al. v. United States, U.S. Ct of Claims</i> , 173 F.Supp. 358	IV: 644		
<i>Cert. denied</i> , USSC, Nov. 9, 1959	IV: 538		

- Barnes v. City of Gadsden, Alabama et al.*, USCA, 5th Cir., 268 F.2d 593 IV: 647
- Barta et al. v. Oglala Sioux Tribe of Pine Ridge Reservation of South Dakota*, USCA, 8th Cir., 259 F.2d 553 IV: 346
Cert. denied, USSC, 79 S.Ct. 320 IV: 12
- Bates v. City of Little Rock*, Ark. Supreme Ct., 319 S.W.2d 37 IV: 136
Certiorari granted, USSC, 79 S.Ct. 1118 IV: 252
- Bd of Ed of City of Nashville, Tenn.; Kelley et al. v. IV: 584
- Bd of Ed of St. Mary's County v. Groves*, USCA, 4th Cir., 261 F.2d 527 IV: 25
- Bd of Managers of James Walker Memorial Hospital; Eaton v. IV: 131
- Bd of Public Instruction of Dade County, Fla. et al; Gibson v. IV: 21
- Bd of Supervisors of Louisiana State University v. Fleming*, USCA, 5th Cir., 265 F.2d 736 IV: 612
- Bennett et al; NAACP v. IV: 349
- Beth Tomche Torah etc. v. Howard et al.*, 185 N.Y.S.2d 511 IV: 689
- Brady v. Trans World Airlines, Inc. et al.*, USDC, D. Del., 167 F.Supp. 469 IV: 333
 174 F.Supp. 360 IV: 646
- Breger, M. & Co. et al; Spampinato v. IV: 95
- Bristol et al. v. Heaton et al., cert. denied*, USSC, 79 S.Ct. 802 IV: 12
Petition for rehearing denied, 79 S.Ct. 1123 IV: 251
- Bristol et al; Heaton v. IV: 302
- Brooks v. School District of City of Moberly, Missouri*, USCA, 8th Cir., 267 F.2d 733 IV: 613
Docketed, USSC Sept. 14, 1959 IV: 540
- Browning v. Slenderella Systems of Seattle*, Wash. Supreme Ct. 341 P.2d 859 IV: 701
- Brown; State v. IV: 334
- Brown v. State (of Maryland)*, Maryland Ct of Appeals, 150 A.2d 895 IV: 741
- Brown v. United States*, USCA, 4th Cir., 262 F.2d 50 IV: 178
- Brucker et al; Seneca Nation of Indians v. IV: 136
- Buchanan et al; Evans et al. v. IV: 257
 574
- Bullock et al. v. United States*, USCA, 6th Cir., 265 F.2d 683 IV: 285
Cert. denied, USSC, 79 S.Ct. 1294 IV: 252
- Bullock v. Tamiami Trail Tours, Inc.*, USCA, 5th Cir., 266 F.2d 326 IV: 361
- Burton v. Wilmington Parking Authority et al.*, Ct in Chancery, New Castle County, Del. 150 A.2d 197 IV: 353
- Bush; Orleans Parish School Bd v. IV: 581
- Calhoun et al. v. Members of Bd of Ed, City of Atlanta et al.*, USDC, N.D. Ga., Atlanta Div., June 16, 1959, Civ. Action No. 6298. IV: 576
- California, People of State of; v. Winters IV: 720
- Cardwell, Jones and, v. People of State of California IV: 253
- Carmen, Reyna Tom, petition of IV: 313
- Carter et al; American Jewish Congress v. IV: 630
- Carter v. McCarthy's Cafe*, Hennepin County, Minn., Dist Ct, 4th Judicial Dist., Reg. No. 532616 IV: 641
- Central of Georgia Ry. Co. et al; Marshall et al. v. IV: 646
- Charlottesville, School Bd of City of, v. Allen IV: 39
- Checkers and Clerks Union; State Commission Against Discrimination on the Complaint of Miller, against IV: 804
- Cherry v. Morgan*, USCA, 5th Cir., 267 F.2d 305 IV: 719
- City of Gadsden, Alabama; Barnes v. IV: 647
- City of Jacksonville, Hampton v. IV: 339
- City of Little Rock; Bates v. IV: 14
 136

City of Nashville, Tenn., Bd of Ed of; Kelley v.	IV: 584	Devlin et al; Watson v.	IV: 93 618
City of Norfolk; Dawley v.	IV: 130	Division Against Discrimination; Green Fields Farms, Inc., v.	IV: 658
City of North Little Rock; Williams v.	IV: 136	Division Against Discrimination; Levitt and Sons, Inc., v.	IV: 658
Cline v. State, Sup Ct of Tenn., 319 S.W.2d 227	IV: 88	Duckworth; James v.	IV: 55 58
Cohen v. Public Housing Administration et al., cert. denied, 79 S.Ct. 315	IV: 12	Duckworth et al. v. James et al., USCA, 4th Cir., 267 F.2d 224	IV: 603
Cole; State v.	IV: 308	Cert. denied, USSC Oct. 12, 1959	IV: 539
Coleman; State v.	IV: 387	Eaton et al. v. Bd of Managers of James Walker Memorial Hospital et al., USCA, 4th Cir., 261 F.2d 521	IV: 131
Commonwealth of Virginia ex rel. Comm. on Law Reform and Racial Activities; Scull v.	IV: 247	Cert. denied, 79 S.Ct. 941	IV: 253
Cooke et al. v. State of North Carolina, Jurisdiction postponed, 79 S.Ct. 312, Appeal dismissed as abated, 79 S.Ct. 737	IV: 13	Edwards; Covington v.	IV: 278
Cooper; Aaron v.	IV: 17	Evans et al. v. Buchanan et al., USDC, D. Del., 172 F.Supp. 508	IV: 257
County School Bd of Arlington Co., Va.; Hamm v.	IV: 36 296	173 F.Supp. 891	IV: 574
County School Bd of Arlington County, Va. et al. v. Hamm et al., Motion for recall and stay of mandate denied,S.Ct.	IV: 14	Evans v. Ross, Camden County Ct, Law Div., 150 A.2d 512	IV: 355
County School Bd of Arlington Co., Va. v. Deskins, USCA, 4th Cir., 263 F.2d 226	IV: 36	Ex Parte NAACP, Supreme Ct of Ala., 109 So.2d 138	IV: 347
USCA, 4th Cir., 264 F.2d 945	IV: 296	Cert. granted and judgment rev'd (sub nom NAACP v. State of Alabama ex rel. Patterson) USSC, 79 S.Ct. 1001	IV: 254
County School Bd of Prince Edward County; Allen et al. v.	IV: 297	Faubus; Garrett v.	IV: 553
Covington v. Edwards, USCA, 4th Cir., 264 F.2d 780	IV: 278	Federal Power Commission; Tuscarora Indian Nation v.	IV: 344
Cert. denied, USSC, Oct. 12, 1959	IV: 539	Fitzhugh v. Ford, Supreme Ct. of Ark., 323 S.W.2d 559	IV: 550
Curtis v. Tower et al., USCA, 3rd Cir., 262 F.2d 166	IV: 310	Fleming; Bd of Supervisors of LSU v.	IV: 612
Dawley v. City of Norfolk, Va., USCA, 4th Cir., 260 F.2d 647	IV: 130	Fletcher; State of La. v.	IV: 173
Cert. denied, 79 S.Ct. 650	IV: 12	Florida, Dade County Bd of Public Instruction; Gibson et al. v.	IV: 21
Day; Harrison v.	IV: 65	Florida Legislative Investigation Committee; Graham v.	IV: 143
Deskins; County School Bd of Arlington County Va. v.	IV: 36 296	Flowers v. State, Supreme Ct. of Ala., 113 So.2d 344	IV: 728
		Ford; Fitzhugh v.	IV: 550
		Francis; Armwood v.	IV: 709

- Frazier v. United States*, USCA, 5th Cir., 267 F.2d 62 IV: 739
- Frazier v. State of Florida*, Sup Ct. of Fla., 107 So.2d 16 IV: 173
- Frisbee et al; United States of America v.* IV: 343
- Fromm; On the complaint of Smith v. Frye; People v.* IV: 807
IV: 744
- Gadsden, Ala., City of; Barnes v.* IV: 647
- Garifine v. Monmouth Park Jockey Club*, Supreme Ct. of N.J., 148 A.2d 1 IV: 160
- Garrett v. Faubus*, Ark. Supreme Ct., 323 S.W.2d 877 IV: 553
- George Washington Memorial Park Cemetery Assn., In the Matter of* IV: 158
- Georgia Public Service Comm; Williams v.* IV: 166
- Gibson et al. v. Bd of Public Instruction of Dade County, Fla. et al.*, USDC, SD Fla., Miami Div., 170 F.Supp. 454 IV: 21
- Gibson et al. v. Florida Legislative Investigation Committee*, Supreme Ct. of Fla., 108 So.2d 729 IV: 143
Judgment stayed, 79 S.Ct. 576 IV: 13
Cert. denied, USSC, 79 S.Ct. 1433 IV: 253
- Ginsberg v. Stern et al.*, USCA, 3rd Cir., 263 F.2d 457
Cert. denied, USSC, Oct. 12, 1959 IV: 539
- Giordano; Tullier v.* IV: 329
- Goldsby, United States ex rel., v. Harpole* IV: 377
- Graham v. Florida Legislative Investigation Committee* IV: 143
- Green Fields Farm, Inc., v. Division Against Discrimination in the State Dept of Ed.*, Superior Court of N.J., Appellate Div., 153 A.2d 700 IV: 658
- Groves; Bd of Ed of St. Mary's County v.* IV: 25
- Grove v. Smyth*, USDC ED Va., 169 F.Supp. 852 IV: 311
- Hamm v. County School Bd of Arlington County, Va.*, USCA, 4th Cir., 263 F.2d 226 IV: 36
- Motion for recall and stay of mandate denied*, USSC IV: 14
USCA, 4th Cir., 264 F.2d 942 IV: 296
- Hampton v. City of Jacksonville*, USDC, SD Fla., No. 4073-Civil-J IV: 339
- Hannahville Indian Community et al. v. Prairie Band of Potawatomi Indians et al.*, USSC, 79 S.Ct. 587 IV: 12
- Harpole; United States ex rel. Goldsby v.* IV: 377
- Harrison v. Day*, Supreme Ct. of Appeals of Virginia, 106 S.E.2d 636 IV: 65
- Harrison v. NAACP et al.*, USSC, 79 S.Ct. 1025 IV: 527
- Harris v. Sunset Island Property Owners, Inc.*, Supreme Ct of Fla., April 18, 1959, Case No. 29,635 IV: 716
- Heaton et al. v. Bristol et al.*, Ct of Civil Appeals of Texas, 317 S.W.2d 86 IV: 302
Cert. denied, USSC, 79 S.Ct. 802 IV: 12
Petition for rehearing denied, USSC, 79 S.Ct. 1123 IV: 251
- Henslee; Bailey v.* IV: 170
- Hollywood Professional Schools et al; Reed v.* IV: 305
- Holt v. Raleigh City Bd of Ed*, USCA, 4th Cir., 265 F.2d 95 IV: 281
- Howard Johnson's Restaurant; Williams v.* IV: 713
- Hunt et al. v. Arnold et al.*, USDC, ND Ga., Atl. Div., 172 F.Supp. 847 IV: 79
- Illinois, People of State of, v. Rybka et al.* IV: 620
- In re American Jewish Congress* IV: 630
- In re State ex rel. Patterson v. NAACP*, Supreme Ct of Ala. 109 So.2d 138 IV: 347
Certiorari granted and judgment reversed, USSC, 79 S.Ct. 1001 IV: 252
- In re Wallace*, USDC, MD Ala., N. D. 170 F.Supp. 63 IV: 97
- In the Matter of George Washington Memorial Park Cemetery Association*, Superior Ct of N.J., Chancery Div., 145 A.2d 665 IV: 158

<i>In the Matter of Jones and O'Meara</i> , Washington St Bd Against Dis- crimination, Case No. h-498	IV: 485	<i>Kelley et al. v. Bd of Ed of City of Nashville, Tenn., et al.</i> , USCA, 6th Cir., 270 F.2d 209	IV: 584
<i>In the Matter of O'Meara v. Washington State Bd Against Discrimination and Robert L. Jones</i> , Superior Ct, King County, Wash., July 31, 1959, No. 535998	IV: 664	<i>Labat v. Sigler</i> , USCA, 5th Cir., 287 F.2d 307	IV: 727
<i>In the Matter of the Application of American Jewish Congress v. Carter et al.</i> , N.Y. Supreme Ct, N.Y. County Special Term, Part I, 190 N.Y.S.2d 218	IV: 630	<i>Lake Placid Club</i> , Application of, v. Abrams	IV: 159
<i>In the Matter of the Application of New York SCAD v. Ackley-Maynes Co.</i> , N.Y. Supreme Ct	IV: 358	<i>Lassiter v. Northampton County Bd of Elections</i> , USSC, 79 S.Ct. 985	IV: 523
<i>In the Matters of Skipwith et al.</i> , Domestic Rel Ct of New York City, Children's Ct Div., 180 N.Y.S.2d 852	IV: 264	<i>Lee; Williams v.</i>	IV: 9
Jacksonville, City of; Hampton v.	IV: 339	<i>Levitt and Sons, Inc., v. Division Against Discrimination in the State Dept of Ed.</i> , Superior Ct. of N.J., Appellate Div., 153 A.2d 700	IV: 658
James et al; Duckworth et al. v.	IV: 603	<i>Little Rock, City of; Bates v.</i>	IV: 14 136
Jameson; State ex rel. Hollow Horn Bear v.	IV: 342	Livingston; NAACP v.	IV: 535
<i>James v. Almond</i> , USDC, ED Va., Norfolk Div., 170 F.Supp. 331	IV: 45	Louisiana, State of, v. Jenkins	IV: 177
<i>James v. Duckworth</i> , USDC, ED Va., Norfolk Div., 170 F.Supp. 342	IV: 55 58	Louisiana, State of, v. Rue	IV: 177
Jenkins; State v.	IV: 117	Louisiana, State of, v. Brown	IV: 334
<i>Jones and Cardwell v. People of the State of California</i> , USSC, 79 S.Ct. 801	IV: 253	Lucky; Sharp v.	IV: 628
Jones and O'Meara; In the matter of	IV: 485	<i>Mabry v. State</i> , Ct of Appeals of Ala., 110 So.2d 250	IV: 312
<i>Jones et al. v. School Bd of Alexandria</i> , USDC, ED Va.	IV: 29	<i>Marshall et al v. Central of Georgia Ry. Co. et al.</i> , USCA, 5th Cir., 268 F.2d 445	IV: 646
Jones, Robert L., and Washington St Bd Against Discrimination; O'Meara v.	IV: 664	Martin, Edmond, Matter of the Application of	IV: 657
<i>Kasper v. State of Tennessee</i> , Supreme Ct. of Tenn., 326 S.W.2d 664	IV: 620	Maryland, St. Mary's County Bd of Ed; Groves v.	IV: 25
<i>Kasper v. United States</i> , USCA, 6th Cir., 265 F.2d 683	IV: 285	<i>Matter of the Application of Edmond Martin</i> , Supreme Ct. of N.Y., Spec. Term, N.Y. County, Part I, 188 N.Y.S.2d 566	IV: 657
<i>Cert. denied</i> , USSC, 79 S.Ct. 1294; 79 S.Ct. 1452	IV: 252	McCarthy's Cafe; Carter v.	IV: 641
<i>Rehearing denied</i> , USSC, October 12, 1959	IV: 538	<i>McCullough v. State</i> , Ct of Appeals of Ala., 113 So.2d 905	IV: 619
		McGee; Nichols v.	IV: 340
		McKinley et al; Aaron et al. v.	IV: 17 543
		McKinley; Shelton v.	IV: 694

- Members of Bd of Ed, City of Atlanta et al; Calhoun et al. v. IV: 576
- Miller, SCAD on the Complaint of, against Checkers and Clerks Union IV: 804
- Moberly, Missouri, School District of City of; Brooks v. IV: 613
- Monmouth Park Jockey Club; Garifine v. IV: 160
- Moralez v. State, Ct of Criminal Appeals of Texas, 320 S.W.2d 340 IV: 387
- Morgan; Cherry v. IV: 719
- NAACP; State ex rel. Patterson v. IV: 252
- NAACP v. Bruce Bennett, Attorney General of the State of Arkansas, USDC, ED Ark., Civil Action No. 3664 IV: 349
- Judgment vacated, USSC, 79 S.Ct. 1192 IV: 254
- NAACP v. Livingston, USSC, 79 S.Ct. 1001 IV: 527
- NAACP v. State of Arkansas ex rel. Bruce Bennett, Attorney General, Supreme Ct of Ark., 319 S.W.2d 33 IV: 142
- Cert. denied, USSC, 79 S.Ct. 1293 IV: 253
- NAACP v. State of Alabama ex rel. Patterson, Supreme Ct of Ala., 109 So.2d 138 IV: 347
- Cert. granted and judgment rev'd., USSC, 79 S.Ct. 1001 IV: 254
- Rehearing denied, USSC, Oct. 12, 1959
- NAACP v. Williams, Ct of Appeals of Ga., 107 S.E.2d 243 IV: 351
- Cert. denied, USSC, 79 S.Ct. 947 IV: 253
- Nashville, Tenn., Bd of Ed of City of; Kelley v. IV: 584
- Neco Electrical Products Corp. and Internat'l. Union of Electrical, Radio & Machine Workers, AFL-CIO, NLRB case No. 15-CA-1093 IV: 481
- New York, State of; St. Regis Tribe of Mohawk Indians v. IV: 343
- Nichols v. McGee, USDC, ND Calif., 169 F.Supp. 721 IV: 340
- Northampton County Bd of Elections; Lassiter v. IV: 523
- Oglala Sioux Tribe of Pine Ridge Reservation of South Dakota et al; Barta et al. v. IV: 346
- Oliphant et al. v. Brotherhood of Locomotive Firemen and Enginemen, cert. denied, USSC, 79 S.Ct. 648, Rehearing denied, USSC, 79 S.Ct. 796 IV: 13
- O'Meara, in the matter of, v. Washington State Board Against Discrimination, and Robert L. Jones IV: 664
- O'Meara, Jones; In the matter of IV: 485
- On the Complaint of Smith v. Fromm, New Jersey Dept. of Ed., Div Against Discrimination, Case No. H 14-10R IV: 807
- Orleans Parish School Bd v. Bush, USCA, 268 F.2d 78, USDC, ED La., July 15, 1959, No. 3630 C.A. IV: 581
- Patterson, Alabama ex rel; NAACP v. IV: 535
- People of the State of California; Jones and Cardwell v. IV: 253
- People of the State of Illinois v. Rybka et al., Supreme Ct of Ill., 158 N.E.2d 17 IV: 620
- People v. Frye, Ct of Appeals of New York, 180 N.Y.S.2d 314 IV: 744
- People v. Rogers, USDC, Md., 168 F.Supp. 573 IV: 96
- People v. Winters, Appellate Dept, Superior Ct, Los Angeles County, Calif., 342 P.2d 538 IV: 720
- Perry; State v. IV: 366
- Petition of Reyna Tom Carmen for a Writ of Habeas Corpus, USDC, ND Calif., 165 F.Supp. 942 IV: 313
- Preservation of Freedom of Choice, Association for; Application of IV: 690
- Prince Edward County, County School Bd of; Allen v. IV: 256
297
538
- Raines; United States v. IV: 314
- Raleigh, City Bd of Ed of; Holt v. IV: 281

Ratcliff v. State, 107 So.2d 728	IV: 127	Shelton v. McKinley, USDC, ED Ark., 174 F.Supp. 351	IV: 694
Red Wolf, Gerald, and Antoine P. Little Light; United States v.	IV: 688	Sigler; Labot v.	IV: 727
Reed v. Hollywood Professional School et al., Superior Ct, Appellate Dept, Los Angeles County, Calif, 338 P.2d 633	IV: 305	Skipwith et al., In the Matters of	IV: 264
Rogers; People v.	IV: 96	Slenderella Systems of Seattle; Browning v.	IV: 701
Rosenblatt v. Florida Legislative Investigation Committee	IV: 143	Smith, on the Complaint of, v. Fromm	IV: 807
Rose v. State, Miss. Supreme Ct, 107 So.2d 730	IV: 129	Smith v. Fromm, New Jersey Dept of Ed, Div Against Discrimination, Case No. H 14-10R	IV: 807
Ross; Evans v.	IV: 355	Smith v. United States, USCA, 4th Cir., 262 F.2d 50	IV: 178
Rue; State of Louisiana v.	IV: 177	Smyth; Grove v.	IV: 311
Rybka et al; People of State of Ill. v.	IV: 620	South Gate Estates, Inc; Waite v.	IV: 482
St. Mary's County Bd of Ed; Groves v.	IV: 25	Spampinato v. M. Breger & Co. et al., USDC, ED N.Y., 166 F.Supp 33	IV: 95
St. Regis Tribe of Mohawk Indians, etc. v. State of New York, Ct of Appeals of N.Y., 5 N.Y.2d 24, 177 N.Y.S.2d 289,	IV: 343	State Athletic Comm v. Dorsey, USSC, Affirmed on Appeal, 79 S.Ct. 1137; Petition for rehearing denied, USSC, 79 S.Ct. 1446	IV: 251
Cert. denied, USSC, 79 S.Ct. 586	IV: 13	State; Brown v.	IV: 741
Petition for rehearing denied, USSC, 79 S.Ct. 1146	IV: 251	State; Cline v.	IV: 88
School Bd of Alexandria; Jones v.	IV: 29	SCAD on the Complaint of Miller Against Checkers and Clerks Union, N.Y. SCAD, Exec. Dept. Case No. C-4750-57	IV: 804
School Bd of Arlington Co Va. et al; Thompson et al. v.	IV: 609	State ex rel. Hollow Horn Bear v. Jameson, Supreme Ct. of S. Dak., 95 N.W.2d 181	IV: 342
School Bd of the City of Charlottesville, Va. et al. v. Allen et al., USCA, 4th Cir., 263 F.2d 295	IV: 39	State ex rel. Patterson v. NAACP	IV: 347
School Dist of City of Moberly, Mo; Brooks v.	IV: 613	State; Mabry v.	IV: 312
Scott; State v.	IV: 740	State of Alabama; Flowers v.	IV: 728
Scott v. Louisiana, cert. denied, USSC, October 12, 1959	IV: 539	State, McCullough v.	IV: 619
Scully v. Commonwealth of Virginia ex rel. Comm. on Law Reform and Racial Activities, USSC, 79 S.Ct. 838	IV: 247	State of Alabama; United States v.	IV: 322 624
Seneca Nation of Indians v. Brucker et al., USCA, D.C. Cir., 262 F.2d 27	IV: 136	State of Alabama; Washington v.	IV: 730
Cert. denied, USSC, 79 S.Ct. 1294	IV: 254	State of California, People of; Jones and Cardwell v.	IV: 253
Sharp v. Lucky, USCA, 5th Cir., 266 F.2d 342	IV: 628	State of Florida; Frazier v.	IV: 173
		State of Illinois; People of, v. Rybka et al.	IV: 620

- State of Louisiana; Jenkins v. IV: 177
- State of Louisiana; Rue v. IV: 177
- State of Louisiana v. Fletcher*,
Supreme Ct of La., 106 So.2d 709 IV: 173
- State of Tennessee; Cline v. IV: 88
- State of Tennessee; Kasper v. IV: 620
- State; Ratcliff v. IV: 127
- State; Rose v. IV: 129
- State Tax Commission v. Barnes et al.*,
County Ct., Franklin County, N.Y.,
178 N.Y.S.2d 932; 185 N.Y.S.2d 781 IV: 347
- State v. Brown*, Supreme Ct of La.,
108 So.2d 233 IV: 334
- State v. Cole*, Supreme Ct of N.C.,
107 S.E.2d 732 IV: 308
- State v. Coleman*, Supreme Ct of La.,
109 So.2d 534, IV: 387
- State v. Jenkins*, Supreme Ct of La.,
107 So.2d 632 IV: 177
Cert. denied, USSC, 79 S.Ct. 1135 IV: 253
- State v. Perry*, Supreme Ct of N. C.,
108 S.E.2d 447 IV: 366
Cert. denied, USSC, Oct. 12, 1959 IV: 539
- State v. Rue*, Supreme Ct of La.,
107 So.2d 702 IV: 177
- State v. Scott*, Supreme Ct of La.,
110 So.2d 530 IV: 740
Cert. denied, USSC, Oct. 12, 1959 IV: 539
- State (of Texas); Williams v. IV: 373
- State (of Florida); Williams v. IV: 744
- Stern et al; Ginsburg v. IV: 309
- Sunset Islands Property Owners, Inc;
Harris v. IV: 716
- Syres v. Oil Workers International Union*,
Local 23 et al., Cert. denied, USSC,
79 S.Ct. 315 IV: 13
- Tamiami Trail Tours, Inc; Bullock v. IV: 361
- Tennessee, State of; Cline v. IV: 88
- Tennessee, State of; Kasper v. IV: 620
- Teplow v. Florida Legislative
Investigation Committee IV: 143
- Thompson et al. v. School Bd of*
Arlington County, Va. et al., USDC,
ED Va., July 25, 1959, Civil 1341 IV: 609
- Tower et al; Curtis v. IV: 310
- Trans World Airlines, Inc. et al;
Brady v. IV: 333
646
- Tullier v. Giordano*, USCA, 5th Cir.,
265 F.2d 1 IV: 329
- Tuscarora Indian Nation v. Federal*
Power Commission, USCA, D.C. Cir.
265 F.2d 388 IV: 344
Cert. granted, USSC,
(Nos. 911 & 921) IV: 252
- Tuscarora Nation of Indians v. Power*
Authority of the State of New York,
USSC, petition for rehearing denied,
79 S.Ct. 1431, No. 384 IV: 252
- United States; Allen et al. v. IV: 644
- United States; Brown v. IV: 178
- United States; Bullock v. IV: 285
- United States; Frasier v. IV: 739
- United States; Kasper v. IV: 285
- United States ex rel. Goldsby v. Harpole*,
USCA, 5th Cir., 263 F.2d 71 IV: 377
Cert. denied, USSC, Oct. 12, 1959 IV: 539
- United States of America v. C. E. Frisbee*
et al., USDC, Montana, Great
Falls Div., 165 F.Supp. 883 IV: 343
- United States of America v. Red Wolf*
and Little Light, USDC, D. Mont.,
Billings Div., 172 F.Supp. 168 IV: 688
- United States v. Raines*, USDC, MD Ga.,
172 F.Supp. 552 IV: 314
Jurisdiction postponed, USSC,
79 S.Ct. 1448 IV: 255
Docketed, USSC
- United States v. State of Alabama, etc.*,
USDC, MD Ala., 171 F.Supp. 720 IV: 322
USCA, 5th Cir., 267 F.2d 808 IV: 624
Docketed, USSC, Sept. 11, 1959 IV: 541
- United States v. The Kiowa, Comanche*
and Apache Tribes of Indians, etc.
Cert. denied, USSC, 79 S.Ct. 650 IV: 13

TABLE OF CONTENTS

841

United Steelworkers of America, Local No. 2708; <i>Whitfield v.</i>	IV: 122	<i>Williams v. City of North Little Rock</i> , Supreme Ct of Ark., 319 S.W.2d 37	IV: 136
Virginia, Norfolk, City of; <i>Dawley v.</i>	IV: 130	<i>Williams v. Georgia Public Service Commission</i> , USDC, ND Ga., Jan. 21, 1959	IV: 166
Wallace, in re,	IV: 97	<i>Williams v. Howard Johnson's Restaurant</i> , USDC, ED Va., 268 F.2d 845	IV: 713
Washington State Bd Against Discrimination and Robert L. Jones; <i>O'Meara v.</i>	IV: 664	<i>Williams v. Lee</i> , USSC, 79 S.Ct. 269	IV: 9
<i>Washington v. State of Alabama</i> , Supreme Ct of Ala., 112 So.2d 179	IV: 730	<i>Williams v. State</i> (of Arkansas), Supreme Ct of Ark., 322 S.W.2d 86	IV: 735
<i>Watson v. Devlin et al.</i> , USDC, ED Mich., 167 F.Supp. 638	IV: 93	<i>Williams v. State</i> (of Florida), Supreme Ct of Fla., 110 So.2d 654	IV: 744
USCA, 6th Cir., 268 F.2d 211	IV: 618	<i>Williams v. State</i> (of Texas), Ct of Criminal Appeals, Texas, 321 S.W.2d 72, cert. denied, USSC, 79 S.Ct. 615	IV: 373
<i>Whitfield v. United Steelworkers of America, Local No. 2708</i> , USCA, 5th Cir., 263 F.2d 546	IV: 122	Wilmington Parking Authority; <i>Burton v.</i>	IV: 353
Cert. denied, USSC, 79 S.Ct. 1285	IV: 254	<i>Winters et al; People of State of California v.</i>	IV: 720
<i>Williams; NAACP v.</i>	IV: 351		





